AN

HISTORICAL ACCOUNT

OF

THE BRITISH ARMY,

AND OF THE

Law Military,

AS DECLARED BY THE

Ancient and Modern Statutes, and Articles of War

FOR ITS GOVERNMENT:

WITH A FREE

COMMENTARY ON THE MUTINY ACT,

AND THE

Rules and Articles of War;

ILLUSTRATED BY

VARIOUS DECISIONS OF COURTS MARTIAL.

BY E. SAMUEL.

Si quid auctoritatis in me est, eâ apud eos utar, qui eam mihi dederunt.

CICERO.

London:

PRINTED AND SOLD BY WILLIAM CLOWES,

NORTHUMBERLAND-COURT, STRAND.

1816.

TO

The Firm Supporter of Order and Discipline;

THE

INDEFATIGABLE PROMOTER

OF

EDUCATION, MORALITY, AND RELIGION

IN THE RANKS OF

The Army;

THE

LIBERAL PATRON OF THE OFFICER;

THE ZEALOUS PROTECTOR OF THE SOLDIER;

THE FRIEND OF ALL;

TO HIS ROYAL HIGHNESS

The Duke of York and Albany, K.G.

&c. &c. &c.

THIS VOLUME,

Attempting to Explain and Elucidate

THE HISTORY, REASON, AND OPERATION, OF THE

Law Martial,

IN ITS DIRECT AND RELATIVE BEARING,

ON THE

Military Society,

AND ON THE

CIVIL CONSTITUTION OF THE STATE;

OBJECTS AT ALL TIMES DEAR

TO THE HEART OF

THE PATRIOT PRINCE,

AND

THE ENLIGHTENED MIND

OF THE

COMMANDER IN CHIEF OF A BRITISH ARMY,

IS,

With Permission,

Most humbly and respectfully

Inscribed and dedicated,

By His Royal Highness's most obliged,

Most obedient and humble Servant,

THE AUTHOR.

PREFACE.

THE great and necessary extent of our Armies at the present day, and the variety and importance of the objects connected with them, have excited, in a more than ordinary degree, the attention of the Public, as well as of those more immediately concerned in the Military Establishments. But notwithstanding the interest taken in the affairs of the Military State, it is a matter of some surprise, that so little pains have been used to describe and explain the Law, by which so delicate, and, it may be added, so fearful a body, in a free State, is to be restrained and governed.

Several preceding writers, it is true, have professed to treat at large on the practice of Courts Martial, and in the course of their direct inquiries have incidentally and lightly touched on the Law Military; but, until the appearance of the ESSAY of TYTLER, no work has of late proposed to investigate the principle of that Law, or to consider the provisions, with their peculiarities, of which it is composed.

The learned Author, just mentioned, has entered into the general history of the Law, and has recounted certain curious historical facts and transactions as related with it; but it appears to have been beyond

his design to penetrate into the particular obligations of such Law, either as they existed of old, or at the present moment, to shew their relative agreement or discrepancy with one another. His plan, so far as may be collected from the manner of its execution, was to present an outline of the Military State, at different periods of our History; of the Law, or rather the quality of it, as generally declared for its government; and of the sources, from time to time, whence it was derived. It had in view, it should seem, to establish certain doctrinal points, as an induction to a great, if not the *principal* object in the writer's contemplation,—the *practice* of *Courts Martial;* a most useful point to be ascertained, though limited in its end, and narrowed in its scope and application towards those, for whose peculiar benefit the work was expressly intended.

It must be admitted by those, who have perused that elegant and learned Essay, that it has mainly accomplished all it had designed; but it has not in any manner exhausted the subjects on which it undertook to treat. So far from excluding, it would seem to invite ulterior inquiry, and has opened the ground, as it were, for the labours of others engaged in similar studies, and interested in the like pursuits.

Anxious alike with the ingenious Essayist, to investigate and elucidate the condition of the soldier, in his individual and aggregate relation in the society of which he is a member; to shew the Law, in its operation on his general state, and particular conduct,

under any and every contingency, the writer of the following pages has aimed at the same end, by varied or different means. He has confined not his pencil, as it will be seen, to the delineation of the leading traits, but has endeavoured to trace out on his sheet the minute features of the Military Law, by which it may become more familiarly known of those, to whom it claims connexion by bonds of kindred or relation. He has conceived, that through the contemplation of the parts, the whole body and character of the Law may be more accurately comprehended, and more permanently fixed in the mind of the reader, than through the exhibition of a few leading, though strong and characteristic features. Under this impression, he has attempted to trace the Law Military from its primitive sources, and to follow it patiently, through all its windings, to its extreme boundaries.

Sensible, that a clear understanding of every legal provision must be important to those on whom it is intended to bear, the author has ventured, in the following sheets, not only to state the particular enactments and regulations of the Law Military, but has offered a copious Commentary, illustrated by precedents, when they were at hand, or the reasoning of others when it was attainable, on the intent and meaning of the *Mutiny Act* and *Articles of War*, the chief, if not the only depositories of the Military Law; and on those passages particularly, where previous doubt or difficulty has been understood to exist. This portion of the work may be considered novel, and by

some, perhaps, superfluous; but not by those, it is apprehended, who have had any conversancy with Military life, or the proceedings and decisions of Military Courts. On this head the Author would run the risk of being too prolix, rather than of being not sufficiently explanatory.

If he shall be found to be too redundant in any place, he hopes that the error may not have induced a less pardonable fault, the overlooking or neglect of any material part of his design, either in following or describing the growth or progress of the British Army, through all its arbitrary and eventful changes, to its present established and legalized form; or the history of the Law, in all its correspondent mutations to the condition of the Army, at different eras, to its improved, if not perfect existing state. He has attempted, however he may have failed in the accomplishment of his intention, to retain what had been usefully selected by others, who had travelled the track before him, in addition to what he has himself been able to collect in the same path. He had even looked to achieve more, as will be shewn in the course of the subsequent pages, than under circumstances he has been disposed to attempt, or may hereafter be competent to perform.

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INTRODUCTION.

Military or Martial Law, the subject of this inquiry, is a particular rule of conduct, prescribed by the legislative authority of the State, for the government of the military force of the nation, in contra-distinction to the law, which regulates, or is intended to regulate the general conduct of the people in their civil relations.

This is not of any distinct or separate quality, but a branch or portion of that law which applies to the great and common body of the people, and must therefore be presumed to partake of the genius and spirit that characterizes the general code.

As the universal law of the State adapts itself, from time to time, to the existent condition of things, so does the law, attaching to a peculiar society, undergo the same changes to which the common law is liable; and is governed, like it, by circumstances, or the fluctuating events of the particular association. This may be pronounced of the law, as affecting the military institution; which seems to have been subjected, in direct concomitance, to the many and eventful changes, introduced by accident, or improvement in legislation, into the laws constructed for the general guidance and protection of the State.

'It would be beyond the purpose of this work, to enter into any comparative inquiry, with the view of tracing the simultaneous and parallel march of the law military to the same perfection, to which the ordinary British laws are supposed to have attained. It will be sufficient, for its end, to pursue the Military Law, from its obscure and slender source, to its present distinguished and copious stream.'

It will be seen, in the progress of the inquiry, that the military regulations, obtaining in the earlier periods of our history, were not formed, as now, for the control of a separate class of men, but for the whole mass of the people; not operative on a particular body, but on the members of the community at large, every one of whom being liable, when capable of bearing arms, to the burden of military service. These regulations enjoined certain duties on citizens, under described penalties, while acting in the capacity of soldiers; but as such capacity was occasional only, the regulations having reference to it, had but occasional force. Yet as a like service might, at stated seasons, or particular intervals, recur, the regulations were not abandoned with the service; but, being calculated to the exigency of the camp, they were continued as a sort of standing legal provision, to be called into operation, as often as the citizens, in the discharge of their military duties, should be summoned to the field.

In this manner the military service of the State was performed and regulated, with few discernible innovations, for several centuries. No material alteration appears to have taken place in it until the time of the Conquest, when the whole body of the laws, as well as the original institutions of the country, were moulded, by degrees, to the will of the Conqueror.

From this period, a gradual, but sensible separation was effected between the duties of the citizen and the soldier, to the utter disunion, at length, of the one from the other. But this was not brought about without much and continued struggle, and often successful opposition on the part of the people; who, from an ardent love of freedom, and consequent jealousy of military power, were always alive to, and suspicious of every military encroachment, introduced, under favouring or predominating circumstances, by various Princes, owing their elevation, and the stability of their authority to the length and temper of their swords. This natural aversion was increased at different seasons by the abuse of military power, in the temporary subversion of the civil rights of the subject.

Men in process of time began to lose a part of their fears for more organized armies, as they became acquainted with their utility, from the maintenance of similar bodies by the surrounding nations, and the necessary adoption of them, in a correspondent policy, at home.

Even after a military establishment had been tolerated in Britain for a series of years, and the good effects of it had been widely experienced, in the various evolutions of offensive and defensive warfare, to the protection and safety of the country, and the exaltation of the national glory, as well as to the convenience of the unmilitary classes of society, left, by such an institution, to the peaceable pursuit of more congenial, and, individually or nationally considered, more advantageous occupations; the legislature, distrustful alike with the people of the nature of military power, still scrupled, perpetuating the scruple by a solemn yearly recognition, to give it any fixed character; to sustain it by any permanent pecuniary fund; or to protect it by any legal ordinances, but of a temporary and limited duration.

But laws, whether enacted for an indefinite or prescribed time, demand one and the same obedience, so long as their obligatory force is declared to enure: they are imperative from the source from which they are derived, and not from the term of their operation. Yet some wild and indigested notions have been indulged, in respect to the supposed quality of Military Law, which would lead one to conclude, that it had been originally much misconceived, or confounded, in an indistinct association, with some other legal provision or practice of State, the authoritative force of which, as genuine law, might fairly be questioned. Such

conceptions had their origin perhaps, at seasons, when the law military was little else than the declaration of the will of the Prince, or of the General to whom he had deputed his authority, and not as at present the commands of the legislature by especial and positive enactments. Or, possibly, such notions might have arisen out of imaginary resemblances, or from abuse of terms, fancied to be synonimous, but certainly not convertible, in assuming the *Law Military* to be the same thing with what commonly passes under the denomination of *Martial Law;* which will appear, on examination, to be nothing more than the offspring of necessity, covering itself with the clothing and taking the name and place of law, though in reality it be, if not a subversion, at least a temporary supercession of all that is sound in legislation, justified and justifiable only in perilous and critical conjunctures, when social order is vitally threatened; when violence can only be resisted by violence; when the sense of danger is so imminent, as to overwhelm every other consideration; where the end or existence of society is sustained, in a natural and spontaneous preference, to the means by which it is brought and held together; when the public safety is preserved at the expense of the public ordinances.

From whatever motive or source such opinions may spring, it is clear that they are erroneous; since nothing can be more obvious, than that the

Law Military, derived, as it is, from the same fountain whence all our laws proceed, must necessarily savour of the virtue that distinguishes the whole. If any inferiority in the Military Law be inferred, from the uncertainty of its continuance, something might be arrogated, perhaps, from the frequency of its enactment. It cannot be overlooked, that its provisions are annually submitted to the revision and confirmation of Parliament: and it is no slight evidence of their fitness to their end, that they have been so successively sanctioned. If other Legislative Acts were to be canvassed with the like strictness, it might be doubted, whether they would equally survive the test. But a dispassionate investigation into the principles of the Military Law, and not a panegyric, is here meditated.

With this pre-intimation of the design and intended execution of this inquiry, I shall proceed, with a short description of the constitution of our ancient and modern armies, and the laws to which they have been from time to time subjected, which have converted them, under wise and politic regulations, from objects of dread, into anticipated, because approved instruments of safety.

AN

HISTORICAL ACCOUNT

OF THE

LAW MILITARY,

&c. &c. &c.

CHAPTER I.

Of the Military State in the Time of the Anglo-Saxons, and of the Law attaching to it.

THOUGH there be abundant records of the spirit and warlike achievements of the earliest British armies, there are few, if any, authenticated accounts of the manner of raising and conducting them. The same thing generally occurs in the first stages of society, when military power is resorted to on occasions of mere defence; when the urgency is sudden, the service, and the preparation for it short, and the remembrance of it consequently transitory.

Little is mentioned, with certainty, previously to the Anglo-Saxon government, either of the mode of collecting the military strength of the nation, or of the direction of it to the public advantage. It requires even a nice search to discover, at periods more advanced, any instructive materials on either of these interesting heads; a circumstance ascribable

in the first place to the antiquity of the subject itself, and in the next, to the barbarous and uncultivated state of the times.

From the scanty sources of information remaining to us, it may be collected, that military service, at this æra, was imposed, by a simple arrangement, as a common duty on the land, and on the entire male population, being freemen, and not incapable by years, debility, or infirmity, of bearing the requisite arms.

Landholders, it seems, were generally bound to provide armed men, proportioned to the rated quantity of the land of which they were possessed, but in different quotas, according to the particular customs of different counties. It would appear, however, that one soldier was usually required for five hides of land*. Lands were sometimes liable to peculiar conditions of service, according to the stipulation of the grantor, which their tenants were obliged to fulfil. The holders of more than five hides were compelled to find substitutes, at their own expense, or by some other means of requital, for the quantity of hides in their possession beyond that number, and after the same proportion for every five additional hides.

Persons liable to military service were summoned, in cases of emergency, by the mandate of the king; and if they disobeyed the summons, were subjected to various penalties. In the case of a freeman having his *sac*, and able to go where he pleased, he forfeited his land at the pleasure of the king. If a freeman, living under another lord, absented himself, the lord was empowered to engage another man in his stead, and to demand a payment from the absentee of a suitable sum for the maintenance of the substitute during the term of service; or if a substitute were not provided, the amount of the sum adequate to such maintenance was demandable of the absentee, as a fine to the king.

* Sharon Turner's Hist. of the Anglo-Saxons, vol. 4. p. 216.

In the time of *Ina* it was ordained, that if a *sith-cind* man, owning land, abstained from the fyrde or expedition, he was to pay 120*s.* and lose his land. If not a landholder, or a ceorle, he was to pay 60*s.* for the fyrde mulct*.

The clergy even were not exempt, so far as the sacred character of their function would permit, from participating in the common burden, but were required to aid the general efforts, by the provision of substitutes, or by pecuniary contributions †, commensurate with the glebe in their hands, or with the service required, in seasons of the first, or as it is more quaintly described, *trinoda necessitas*, the *threefold* necessity, *i. e.* in internal insurrection, actual foreign invasion, or the expectation of it, in consulting the means and facility of defence, by constructing fortresses and public works, and repairing the bridges and highways. This especial duty ended when the particular circumstance, that urged it, ceased to operate or threaten.

The ordinary service, attaching to the common body of the state, seems to have been extremely simple, and of short duration. This constrained all persons, subject to military duty, to provide themselves, at their own cost, with arms, according to their condition, and to appear at a given place and stated time, usually in the spring, for the purposes of review and of exercise. The armour and weapons, consisting for the most part of a helmet and shield, covered with skins, a sword, brand, axe, bill or javelin, then in use, were supplied by little labour, and at small expense, the workmanship being rude, and the materials of trivial value. Whatever arms or armour the individual selected, or was obliged to furnish himself withal, he was bound to preserve

† Sh. Turner's Hist. Anglo-Saxons.

* There are instances, and not few, in which the higher dignitaries of the church served in *person*, and acquitted themselves, on the most trying occasions, with the most distinguished gallantry.

for future emergencies, and was not suffered on any pretence to alienate, but was compelled to transmit them to his heir or successor.

The duty falling on those attached, from rank or possessions, to the cavalry, was of a more expensive, as well as more honourable order; the horse-soldiery consisting principally of Thanes.

The aspiring or better conditioned began to prepare themselves for arms at the age of fourteen *.

Personal service was not requited, at this time, by any stipend or pay, though it was customary for the person, finding a substitute, to give to the latter sufficient for his support during the term of service, at the rate of about 2*s*. 6*d*. per week †.

It must be understood, from the gratuitous nature of the service, as well as from the simplicity of the instruments or weapons employed, of which it demanded but moderate practice to acquire the mastery, that the term of it was not, at these periodical reviews, though it might differ at seasons of hostility, either long or inconvenient. The general body, with the saving, perhaps, of a small number of undisciplined recruits, was in all probability dismissed after a few days' exertion, to the comfort of their homes.

From the passage in the doomsday book, referred to in the last note, it might be conjectured that the ordinary term of service, in time of hostilities, was two months; as the provision for the substitute was calculated for that space. But armies were sometimes kept in the field for a much longer period, and more especially by *Alfred*, when engaged

* Sh. Turner's Hist. Anglo-Saxons, vol. 4, p. 54.

† It is mentioned in the doomsday book, that "if the king should send an army any where, only one soldier should go for five hides; and for his victuals and pay every hide was to give him four shillings for two months." This money was not to be sent to the king, but to be given to the soldier.

in his severe and continual struggles with *Hastings*. They were held together, however, as it is noticed by the Saxon historians, more by the ingenuity and contrivance of that great and patriotic king, than by the course of the military service. *Alfred*, perceiving that the surest way of conquering the invader would be by a protracted warfare, rather than by a general action, or a succession of battles, to be fought by the whole and co-assembled body of his people, formed his armed force into two divisions; one of which he suffered to remain at home, for the purpose of pursuing their common employments, whilst the other should be sharing the dangers and the labours of the field. When the one half of his force had completed a certain portion of service, the other was called to supply its place, and in this manner they relieved each other alternately. By this happy distribution of his numbers, the king maintained a constant army in the field, to the surprise of his adversary, and to the admiration, as well as ease of his own subjects *.

The method of assembling and marshalling the troops, was as admirable in itself, as any other part of the plan. The head of every family was required, at the public call, to lead forth to the spot appointed, its several subordinate members liable to military service. Family after family were marched in this patriarchal manner to the field of exercise; not to be broken and divided on their arrival there, but to be retained by an humane, as well as judicious arrangement, in their primitive shape. A subsequent, ready process, congenial with their civil customs, formed them into bodies of larger extent, by the communion of ten families one with the other, denominated in their aggregate form, as the term implies, *tythings*. Over each of these an officer was set, in immediate command, called *conductor*, correspondent in authority, if not the same officer, though

* Sax. Chron. 92.

differently styled, with the *borsholder*. Ten of these latter bodies were next incorporated, and designated a *hundred*, commanded by the principal local magistrate, known in his military capacity by the title of *hundredary**. Several *hundreds*, their numbers varying with circumstances, composed the largest corps, acting at that time in an independent body, called a *trything*, subject to the command of the *trythingman*.

According to the extent or population of the respective counties were the number of trythings; but whether they were more or less, the collective force of each county was conducted by a leader of its own choice, chosen usually of the nobility, for his conspicuous and eminent qualities, of wisdom, fidelity, and courage, named the *heretoch*, dux, or duke. All the officers, also, in charge of the inferior classes, like this their chief, agreeable to a governing principle in the Saxon constitution, obtaining in all offices of public trust, were elected by the people.

Over the entire strength of the country, from whatever counties, or in whatever proportions supplied, the king exercised, in time of war, a full and complete sway; sometimes using it in his own person, at others committing it to the *kyningshold*, importing the king's lieutenant or general; the commission ceasing with hostilities.

In time of peace the command of the force of the counties, respectively, reverted to the *heretoch*; whose power in all things relating to the economy, conduct, and government of his contingent, was nearly unlimited; a power supposed by some to have exceeded the due boundary, as bearing too heavily on the prerogative of the crown, and certainly liable

* Grose, in his Military Antiquities, gives this curious and ingenious account of the mode of this officer's election. "This officer was elected by the hundred, at their public court, where they met armed, and every member, as a token of his obedience, touched the weapon of the hundredary; whence the courts were called *wapentakes*, a name still kept up in Yorkshire."

by abuse, of which it was susceptible, evidenced by more than one instance in our early annals, to be directed to the subversion of the kingly authority, and the interruption of the line of succession. The power of the *heretochs* is described, in the laws of *Edward* the *Confessor*, to have been so plenary and absolute, as to be bounded only by their own discretion, it being permitted to them to regulate the force of the county, " prout eis visum fuerit, ad honorem coronæ et utilitatem regni :" " as to them it might seem best for the honour of the crown, and the service of the realm."

These few particulars are all that is traditionally handed down, on the organization, the control, and government of the Anglo-Saxon armies. However imperfect they may be in themselves, they yet tend to shew, that the military associations at that æra were not ill adapted to the spirit of the times, or the condition and genius of the people ; nor altogether unsuited to the purposes of resistance or defence. They were associations, the most promptly drawn together, and most easily formed ; the most cheaply maintained, the least harshly governed, and demanding the slightest sacrifices of civil habits or liberties. Such is the small alteration they introduced into the life and manners of the individuals included in them, that the camp must have seemed more like a city, where every man was surrounded by his relatives and friends, and ordinary magistrates, than an assemblage of men in a strange and foreign employment.

The peculiar laws, regarding these associations, must have been few in number, and plain in their nature ; prescribing some particular additions to the general obligations of the members of them, as created by the common law. Some legal provisions might perchance be needed, having respect to the formation of the military association itself, to the preservation of it as a body, and to the combination of its strength ; but these were all that the law-givers could have

to frame for the regulation of this truly national force. The rest of the military ordinances might have been left, as occurrences should render them necessary, to the care of the *heretoch*, for it has been observed that his authority was large; and he being an occasional and elective officer, a power, otherwise so dangerous, might have been reposed, without any unreasonable apprehension, in his hands.

It has been remarked, that a pecuniary penalty and a forfeiture of land, were the legal consequences of the neglect or disobedience of those, liable to military service, who should not appear at the summons or mandate of the king. These must have had the effect of filling the ranks with promptitude.

When the military retainers were once assembled, they were not allowed to separate, but by express permission, until the determination of the prescribed period of service. If any one withdrew from the host, without licence, and whilst the king should be with it, he was doomed to the forfeiture of life and goods: or if he quitted the army, whilst under the orders of any other commander, he was subjected to the fine of one hundred and twenty shillings.

In the digest of the laws, passing under the title of the laws of *Edward* the *Confessor*, it is declared a forfeiture of life and goods of any soldier, who, from cowardice, should desert his leader, or abandon his comrade, in the time of actual service, by land or sea: and the lord of such a miscreant was empowered to resume any grant of land, previously made in his favour. By a like ordinance, to be found in the same compilation, but with a more grateful and more effectual mode of enforcing its policy, it was ordered that all amounts due for reliefs, or other public duties, at the decease of any one slain in the field of battle, and in the presence of his lord, should be remitted to his heirs; who should be allowed to take the monies and lands of the de-

ceased, and divide and appropriate them to themselves, according to the course of legal distribution, without any diminution whatever.

Having made the grand bond of union in the military community secure, there could be no commanding necessity for attending to the minor articulations; as every soldier carried about him the table of his laws, and owed the same duties in the field, towards his neighbours and fellows, as were directed and enjoined by the finger of the law for his observance within the walls of his town or village. Soldiers, so circumstanced, could have few duties to perform, in accession to those dictated by their prevailing relations to one another, and these could be rarely broken or neglected, as the breach or the non-observance of them must have been speedily detected and checked, by the vigilance and superintendence of the officers, accompanying them to the field, and now exercising a correlative military authority to what they civilly held within the borders of their own vicinage.

The course of the administration of justice to the retainers of the camp, is not to be learnt from any written account; but the hinge, on which the whole military system turned, would seem to point it out.

It was the main purpose of the military scheme, to make the great mass of the people, with as little change as practicable, subservient on the spur of the occasion, and which the simplicity of the season favoured, to the military exigencies of the state; and, therefore, cautiously to retain all the previously subsisting ties between the people and their magistrates and civil officers, by continuing the same persons, with scarcely any alteration even in title, in the same relation to and dependence on each other in their temporary condition, as in their relative stationary state. It was the leading feature of the plan to convert the public body, by an easy and safe transition, with all the branches of its government,

and all the machinery calculated to put it in motion, and preserve it in order, from its pacific relation, into an organ of opposite character. It is curious to observe, in the operation, how well the means and the end were fitted to each other; and with what facility, in the pursuance of such an arrangement, men cast off their natural habit, and clothe themselves, for it is literally nothing else, with a new and discriminative garb. Thus the *borsholder*, the *hundredary*, the *trythingman*, the *heretoch*, the first and last of the public functionaries, with all the intermediate range of officers, were transferred with a singular adroitness, with the rights and authorities of their offices, from the duties of the forum, to the service of the field. And here it may be presumed, without any rashness in the presumption, that they dealt out to the military suitors the same measure of justice, and after the same manner, by which it was before administered at their own doors. This circumstance, more than any other, would have a tendency to reconcile the sturdy and unbought soldiery of the times to the inconveniencies, whatever they might have been, of the military life.

There was certainly much to approve in this pure, plain, and natural system, with respect to the society, the times and circumstances under which it was introduced, but not such a superabundance of merit, as to induce a preference of it, which some would arrogate, to every other military system. It is usual to speak with enthusiasm of past excellencies, and to forget, in the glowing admiration, and the eulogy pronounced on them, that they had any attendant alloy.

The interval, for which this system obtained, may not inaptly be called the golden age of the military cycle; but which could not be brought back, if any visionary should wish it, without reducing, in an inverse course of civilisation, every thing about it into its component principle, and first

rude element; or without the conviction, that, however suited to its original purposes it might have been, it was found at length, in the course of time and progress of things, neither of which being capable of confinement to a given point, to be unequal to succeeding exigencies. Yet the system endured, from its acknowledged virtues, through the heptarchy, and survived the innovations consequent on the several invasions of the Danes, and the further radical change of the divided and mixed mode of government into a monarchical form. And when at last it expired, it fell not by itself, but was attended in its downfall by the prostration of the chief institutions of the country, founded in great antiquity, and rendered sacred by their use. The event that led to this general overthrow was the Norman conquest, whence are to be dated the most important variations in our civil establishments, and the most characteristic change, as we shall presently perceive, in our military constitution.

CHAPTER II.

Of the Military Establishment and Command, from the Conquest to the Revolution.

THE unfortunate issue of the battle of Hastings, manifesting the vast superiority of an established and well-disciplined army, over new and inexperienced levies, shook the foundation of the freedom, if it fixed not the fate and condition of the empire. The many and arduous struggles that followed, are proofs of the patriotism and courage of our hardy forefathers, but are at the same time evidence, from the ill-success attendant on them, of the irresistible power of the invader, and the completion of his conquest. It has been long a consolation of national pride, industriously fomented and flattered by the pen of the British historian, to consider the possession of the country by *William* the *First*, more in the light of an acquisition, than of an unqualified reduction of the island; but although prudence, in the beginning might have dictated to the Conqueror some caution in the use of the full rights of conquest, he did not long forbear from introducing generally among his new subjects the most obnoxious foreign regulations, and the most indisputable badges of slavery; and these under so little disguise, as to evince what he himself thought of the plenitude of his power, and the helpless situation of the people.

Of the many and great changes introduced by the Norman conqueror into the British constitution, a few may be cursorily mentioned; such as the alteration of the whole

judicial arrangement by the division of the jurisdiction of ancient, and the erection of novel and inconvenient courts; the investiture of foreigners with the judicial and principal offices of the state; the institution of pleadings, as well as the general administration of the law, and of the common prayer in a foreign language; the importation of subtle legal devices, as oppressive in themselves, as they were dangerous in the manner of their exercise; the abolition of the trial by jury in many cases, and the substitution of the trial by combat; the devastation and depopulation of the country, by the conversion of fertile land and flourishing villages into forests and wastes, for the mere personal diversion of the sovereign; the formation of a rigorous and almost intolerable police, permitting a cheerless and gloomy hospitality,—and forbidding all intercourse and neighbourhood at the close of the labours of the day, by the melancholy warning of the curfew;—and lastly, the establishment of the feudal tenure and service, the most ingenious and effectual instrument that could be devised for enslaving, and keeping enslaved, the whole circle of the people; working an utter and universal dependence on the power of the crown; operating or attaching first on the principal proprietors of the soil, and communicating through them, immediately, or not very remotely, with every other class of the community; knitting each to the other for the mutual protection of the little left them to protect, and binding the whole together by a chain of many close-drawn links, for the support and service of the great feudal lord, from whom that little was supposed to be derived. This the first principle of the system was afterwards so enlarged, as to render the subject as absolute a dependent on the sovereign for his possessions, as for his personal liberty; till his state became at length so positively, and so extensively wretched, that it would be hard to decide whether it was more galling and oppressive from the civil

impositions heaped on it, or the pressure of military restraints. These impositions and restraints were not less lasting than severe; rooted in the nature of the system, or so artificially inserted in it, that they could not be eradicated for ages, though the removal of them had been attempted by the strongest and best directed exertions of our ancestors.

It is not necessary, from the limited nature of this inquiry, to trace with any minuteness the invention or origin of the feudal institution—or to shew the many onerous civil duties with which it burdened the people of this realm, under the shape of aids, reliefs, first-fruits, wardships, fines, with a long train of grievous concomitants, and consequences. These have been treated of by writers on the general law, and by many eminent persons, who have made them their study, and proposed them as the objects of their particular investigation. It will be sufficient for the purpose, to give a summary account of the institution itself, and of its introduction into and bearing on the military constitution of the country.

The feudal system originated, as it appears from credible accounts, in the military policy of the *Celtic* nations, and was brought by them into the countries, of which they possessed themselves, on the dismemberment of the Roman empire. Wherever they planted colonies, in the different portions of Europe, there they also planted this, the fruit of their favoured policy, presenting, as it should seem to them, the best means to sustain, what it had undoubtedly been the chief instrument of acquiring. It founded itself on a single but powerful principle,—of the intimate incorporation of private with public interests, through the simple process of a common partition or apportionment of the acquired territory, whatever it might chance to be, by the military leader, among the principal officers of his army; to be by them allotted out by a given and probably a propor-

tional scale, among their subordinates and fellow soldiers; on the inseparable condition that they should maintain one another, through their several gradations, in their respective acquisitions. This union of their interests, this reciprocation of obligations, was marked by the most striking solemnities, and confirmed by the sanctity of an oath of fealty; binding the party, taking such oath, to him administering it, the immediate grantor of the allotment, to faithful and loyal service at home and abroad, in peace or in war; and making the breach of the oath a forfeiture of the grant.

In this system, it may be seen, that on the safety of the whole, depended the security of the parts,—and these again paid back the guarantee by reflecting the security which the members severally experienced on the body at large. Not an individual could be injured, in this politic institution, without a perception and participation of the injury throughout the whole body. The smallest vibration, at one extremity, communicated through a subtle medium with the opposite extreme. Thus from the general to the lowest member of the camp, one and the same interest prevailed, differing in degree, but not in essence, arming every hand, and animating every heart in the common cause. Thus was an army constantly embodied, ready for every emergency, and united by the closest bond of union.

The connexion which held it together was the allotment, immediately noticed, called a *feud* or fee, which served, by a fortunate contrivance, as a reward for the past, and a retainer for future services.

The vigour and strength of the system was every where declared in its effects; and these became so truly formidable, in the seat of the system, or the vicinity where it predominated, that it soon began to be gradually acted on by the nations around, as an indispensable mean of defence.

About the year A. C. 800, there was hardly a Continental

state, bordering on any of the northern colonies, that had not adopted the principle of the feudal system, fitting it, so far as it was adaptable, to the genius and constitution of its government. It eminently flourished, at the Conquest, in the province of Normandy; and had been the principal instrument in effecting the recent triumph of the Norman arms. Its use having been so signally ascertained, it would have been an extraordinary oversight in the Conqueror, if he had neglected such an engine, in consulting the requisite force for the maintenance of his newly acquired dominions.

Though circumstances were not convenient, for the establishment of the system in Britain, at one step, the Conqueror lost not the opportunity of turning every contingency, and many occurred, into a circumstance favourable to his project.

The grand characteristic of the system, it may be remarked, is the actual or supposed right of the supreme lord in the whole soil. Now, whatever might have been the consequences of a single victory, they could not have been so decisive, as to have led the victor to suppose, in the flattery of his success, that the mere possession of the field of battle, was a virtual possession of the whole territory of the kingdom; to be converted, at his will, in despite of the feelings and rights of the actual possessors, into any shape that he might choose. If the wary Norman had yielded to the supposition, he would soon have awakened from the delusion by the thick-gathering hostilities with which he found himself environed, on advancing into the interior of the kingdom. He was not blinded, however, by his success; but, on the contrary, it seemed to quicken his policy, and render it more clear-sighted, so as to turn the frequent opposition he had to encounter, in the first years of his dominion, into so many advantages for the furtherance of his great design—the subjection of the kingdom to the condition of feudal tenure.

Thus every successive battle, every fresh acquisition, afforded an occasion for rewarding his foreign adherents with the forfeited land of his adversary, and of subjecting the grants, as they proceeded through his hands, to all the feudal incidents to which his followers were habituated and attached. As the Conqueror's views, and his soldiers' interests had the same motive and direction, it may be conceived, that if they found not ready means of gratification in the natural opposition springing up against a foreign rule, they would seek opportunities for indulgence, in the practised severity, and possibly, on some occasions, the studied policy of the ruler. The impatience and restlessness of his new subjects, instead of thwarting, co-operated freely with the Conqueror's design. Insurrection succeeded insurrection, with their constant attendants, forfeiture and assumption; until the greater or more valuable part of the landed property of the kingdom had passed, by the liberal distribution of the sovereign, but in a qualified condition, into Norman hands, ready to defend it against all accidents, and at all hazards. The frequency, if not the obstinacy of these revolts, created a necessity for the establishment of large armies, requiring continual recruits and reinforcements from abroad, and fresh candidates rushed in consequence into the country for further military rewards, increasing in the end the number of feudal tenants, and confirming the strength of the tenure, These, powerful in themselves, were surrounded by strong artificial defences; so that in a few years from the Conquest, the entire country was overrun by the Norman lords and their dependents, and the surface of it every where bestudded with castles and fortifications; keeping at once the favourites in their possessions, and the people in their subjection.

It was not until A. D. 1085, about nineteen years from his first acquisitions in England, that the Conqueror thought fit to declare the ultimate measure of his policy, which was to

put the seal to the bondage of the country, in manifesting his intention to reduce it generally to all the exigencies and severities of military service. At this period he ordered an universal survey of the lands throughout the country, dividing them into definite proportions, called knights' fees, and registering such divisions in a volume appointed for the purpose, named the Doomsday Book. The number of fees here registered, are said to have amounted to 60,000. What was at first the yearly value of the land, constituting the fee, is not precisely known; but in reigns not distant from the Conquest, it was estimated at 20*l.* per annum.

In 1086 the nobility, and all the landholders of the kingdom, were formally summoned to meet the king at *Sarum*, when they were required to submit their lands to military tenure, and to take the oaths of fealty which it enjoined. This submission is said, by a very learned writer, to have been induced by the recent apprehension of a Danish invasion; when the kingdom was found to be in so naked a state of defence, that it was held necessary to call to its assistance a large army of Normans and Bretons, who being quartered upon the landholders, had produced so many grievances, that the people were inclined to fall in with the policy of the crown, rather than expose themselves to a repetition of the evil. The reception of the feudal system is therefore said to be more of choice than of constraint. But Sir *W. Blackstone*, in another part of his Commentaries, would seem to give a more accurate account of this transaction, by describing it as a compound of force and of fraud—for speaking of the consent of the council of Sarum, the learned judge mentions it "to have been partly extorted, and partly given" without any apprehension of the consequences which afterwards ensued.

The apprehended invasion and its events might have been, as it is asserted, the immediate cause of the intro-

duction of the feudal system, but the way for it had been cleared by numberless forerunning circumstances, among which may be enumerated the reduction of all acquired land into feudal tenure; the gradual, and at length the broad extension of that species of property; the superior protection which it afforded, and the greater splendour as well as safety derived from it. The authority of the crown, from this great accession of power, and the actual force of its armies, must also have had its influence in this remarkable surrender of the whole landed interest of the country.

The concurrence of the council at Sarum might have added something perhaps to the solemnity, but not much, it may be supposed, to the quality of the act; since such assembly must have been principally composed of the creatures and dependents on the crown, and had not that importance attached to it that was possessed by the Saxon wittengemot, or afterwards by those conventions, which bore somewhat a nearer resemblance to our parliaments.

Though the grand cause of the introduction of the feudal system may not at this day be ascertainable, not so its effects on the military institutions of the realm, and on the general liberties of the people. Both of these experienced so important and so deep-rooted a change by its introduction, that it was the business of after-ages to break the bonds which it had forged asunder, and to bring things back, so far as they were reducible, to their first simplicity; a victory achieved not without contest, and secured not without blood. But to proceed to the consideration of the effects of the system on the military state of the kingdom.

Its first operation, all that perhaps was originally intended, all undoubtedly that was chosen to be avowed, was to place a numerous and select body of men, well armed, and appointed, during the prescribed period of service, at the absolute disposal of the crown. The amount of the new force

was made to correspond with the number of knights' fees; fixed or stated, as has been above observed, at sixty thousand; to be raised in the following manner.

Every proprietor of a knight's fee was compelled to appear at the king's summons, with his horse and suitable arms, to be ready in all things to attend the sovereign in his wars, without any pecuniary reward, for the space of forty days in every year; these days to be calculated from the time of his joining the army.—If the particular service on which he was embarked, exceeded forty days, he was entitled, for the excess of time, to a certain stipend, at a fixed rate per diem. If the proportion of land amounted to more than one knight's fee, he was bound to find substitutes, to serve, in like manner with himself, for every separate knight's fee which he possessed, and on the like terms and conditions of service with the principal. In process of time, the immediate tenant of the crown was sometimes allowed to work out his knight's service, by two esquires—who were reckoned together equal to one knight. The proprietor of half a knight's fee was held to twenty days' service, so in proportion for any aliquot part or fraction of the fee. The lands of the religious, strange as it may appear, were not excepted from this duty; though the clergy generally were permitted to discharge it by deputy.

When the lands of the tenants in chief fell, as they often subsequently did, into the possession of women or minors, or when the knight-tenants, either from sickness or infirmity, were not competent to personal service, the duty was allowed to be performed by a substitute, but not usually without the payment of a fine for this indulgence; an all-prevailing and all-quieting expedient in these uncivilized ages.

In order to render the provision of substitutes more easy, the principal or capital tenants had the privilege of making under grants to their relatives or dependents, on the same

conditions of fealty towards themselves, with which they mediately held their lands of the crown: so that the under-tenants were obliged to follow their principals to the wars, properly mounted and armed, at their own cost and expense; and to render to their respective lords all the like services, which they, in their turn, were bounden to perform to the sovereign. Even the under-tenants, in the course of time, had also their dependents and vassals; and it was not unusual, in the first days of the feudal institution, for the knights to go forth to fight the king's battles, within or without the realm, accompanied by a train of attendants on horseback and on foot.

Inattention or disobedience to the summons of the crown, was followed sometimes by the forfeiture of the tenure, but commonly by a very heavy fine. The constable or marshal, the great officers of the army, gave certificates to the knights who had completed the term of their services; to enable them to shew their discharge, whenever they might be called upon for that purpose, or probably to receive, when the case entitled them to it, any pay that might be due to them for extended or extraordinary duty.

This system added to the ordinary force, at the command of the king at the time, an effective body, with occasional diminution, perhaps, from the causes mentioned, of sixty thousand cavalry; a species of troops eminently adapted to prevent or curb any formidable risings of the people, or to quell insurrections *when* raised.

When the power of the crown should be thought to rest on a solid foundation, it would soon be felt, that so large a body of horse, in an insular situation, however well calculated it might be to the great end of its formation, was ill suited to general purposes; least of all to the exigency of external warfare, and would not fail, in proper season, to be

modelled according to occurrences, on other more convenient principles.

It does not appear that any material variation was made in this establishment during the reign of the Conqueror, or his immediate successors; but there may be distinctly recognized, at no remote period, the most striking deviations from the earliest practices and usages, in the commutation of the nature of the service, the composition of its duties, and the perversion of it, at least, from its military uses, into an engine of civil extortion. It will not be impertinent to note, as we proceed, certain of the most striking aberrations from the first design of the institution, after some slight notice shall have been taken of the existing force of the country, when this remarkable addition was made to it, at the instance of the crown.

In speaking of the military power of the kingdom, there ought not to be included in the account the foreign soldiery brought into the country, on the express occasion of the Conquest; though many of them were retained and employed after the especial exigency had been answered. This power consisted principally, being prepared to the Conqueror's hand, and not inapt for his use, of the description of men who constituted the primitive strength of the country. It embraced, as shewn in a preceding chapter, the whole free population of the country between the ages of sixteen and sixty, designated the *posse comitatus*, attendant on the summons, so often as necessity demanded, of the sovereign authority, and obliged to gratuitous service, a mighty material, sufficient of itself with very little organization, of which it was susceptible, for the varying purposes of the state.

This force, though abundantly strong, seemed to have more of a defensive character in its constitution, than of an

active principle; being confined, in contradistinction to the unlimited service of the feudal troops, to service *within* the realm; but, aided as it was by the feudal establishment, must have been powerful enough, one should have thought, for sustaining a more questionable title than the Norman prince had apparently acquired. Yet it is hard to determine when military adventurers are in reality secure—And it is plain that *William* did not think himself so, until he had added to these prodigious armies bodies of foreign mercenaries of a variety of nations; a species of troops which has been introduced in almost every intermediate reign, from the Conquest to the restoration, with more or less frequency, as higher notions of prerogative, or suspicions of the public loyalty, have chanced to predominate.

These were employed, at first, in the defence of the castles and fortifications of the kingdom, and in guarding the marches or frontiers bordering on Scotland and Wales; but more largely used, in the succeeding reigns, in repressing the growing power of the barons, and the sudden insurrections of the people.

Besides the different kinds of constitutional force, and the foreign mercenaries just noticed, a better formed and more disciplined body of indigenous troops were entertained occasionally by the Conqueror, under the denomination of *stipendiaries*, serving, as their description denotes, at a stated salary or pay: an organ of most effective strength, destined afterwards to supersede the military purposes of the feudal, and to interfere with the first principle of the Anglo-Saxon system, and, ultimately, to lay the foundation for armies of a more permanent nature than were known in the early ages.

The services of so immense a corps of cavalry as the feudal system put under the control of the sovereign, could hardly ever be required in foreign expeditions; or if required, could not be made available, from the enormous

expense incidental to the conveyance of them to transmarine countries. This defect, therefore, in the military branch of the feudal system, as referable to England, or rather to the peculiar policy of the reigning sovereigns, was detected as it came into employment in external warfare, in which it was but too constantly used, by the princes of the Norman race.

But though deficient here, it possessed so much capacity of conversion to the will and private interests of the sovereign, that it was continued in its original shape, without an attempt at any visible reformation of its principle. The first noticeable variation in the manner of carrying it into effect, took place at the commencement of the reign of *Henry* the *Second;* when a commutation of the knights' service was generally permitted to those who were desirous of commuting it, for a composition in money, variable and varied in amount, being settled, in every instance, by private agreement between the individual and the sovereign. The compositions, as the required service became more burdensome, were the more frequent, and in a short time were generally practised; the quantum of composition rising in the degree of the irksomeness of the duty. These compositions furnished a new and not inconsiderable revenue to the crown, by which it was supplied with means to engage armies more highly disciplined, and more subservient to its head, than a popular or national force.

The success attendant on this contrivance, led to others distinguished by the same family feature; which may be regarded rather as excrescences from the first, than as fresh additional abuses, such as the invention of scutages, with other numerous and cumbrous appendages; all alike tending to enrich the king's treasury, at the expense and the oppression of the feudatory tenants. These, multiplied to an almost incredible extent by the ingenuity of the Norman lawyers,

in the shape of aids, first-fruits, *&c. &c.* formed, in process of time, the bulk of the regal revenue.

The ability of the knight-tenants to purchase exemption from the duties of the field, probably induced the crown, in seasons of pressure, to demand further pecuniary taxes; which in opposition to the composition for the commutation of service, acting on the *person* of the military tenant, were laid on his lands at discretion. These latter impositions came unaccountably to be described by the same term with the first, though they have not the slightest affinity with one another. The first affording an exemption from military service, might not, by any far-fetched or unnatural allusion, have been figuratively expressed by the term *scutage*; being a *shield* or protection, as it were, from the burden of military service, or the consequences resulting from the non-performance of it. But the latter was a direct impost on landed property, that might, when delivered into the treasury, have been applied to any purpose, civil, military, or mixed; which was the parent in the end of a permanent source of revenue, under the description of the land-tax.

The first might be considered as a fine for dispensation with the service of the military tenant,—and is stated under that description in some of the rolls in the exchequer; but the latter *scutage* was an avowed charge on the land, having no aspect to such service, though it was often levied, sometimes with, and often without the consent of the great council, in an arbitrary manner, in alleged aid of different wars it is true, but not unfrequently diverted from its first destination. These latter scutages were at times exacted while the tenants in capite were actually performing military service in the field: which demonstrate, that they had no relation with the compositions.

The accumulate pressure of these burdens began to be

grievously experienced in the time of King *John*, and the reigns immediately following, when attempts were made to put some limit to their number and their amount. The reiterated struggles of the barons, at this and at subsequent periods, to resist these innovations and abuses of the military branch of the feudal system, are well known to every reader, and need not be repeated. This had the effect of involving the crown and the barons in constant strife, and the people in continual civil war, and of introducing various changes in the succession, and of deluging the country with blood. The system, however, had taken so deep a hold in the first century, during which it flourished undisturbed, that it was not to be rooted out by all their efforts, and although the evil consequences of it were deplored by all of the parties engaged in such unseemly and unnatural contests.

What must have been the sentiments of the people towards it, may be collected from one of its effects, as mentioned by an historian of the day—who says,—" Erant in Angliâ quodammodo tot reges, vel potius tyranni, quot domini castellorum :" " that there were as many kings, or rather tyrants, in England alone, as there were lords of castles." These castles could not be less grateful to the crown than they were to the people—and hence the pains exhibited for the demolishing of these internal fortresses by King *John*, and in the more deadly baronial wars in the reign of *Henry* the *Third*.

The crown must, therefore, have been disposed, so soon as it fell on the several devices, on which it resolved, for converting the feudal tenure into a source of taxation, to discontinue the military uses of it; since it was obvious, that such uses, though they had at first armed it with a new and extensive power, had also created a counterpoise, in the

attachment that sprung out of them, of the under-tenants to their immediate lords, which often prevailing over loyalty, set them (a disciplined and formidable force) in array, under banners unfurled against the sovereign. Still the military part of the tenure was allowed to survive, so long as it presented the means for increasing the revenue, and confirming, if not perpetuating, the fiscal purposes which it introduced.

The learned editor of the Commentaries remarks, but not, it seems, with his usual accuracy, " that the military or warlike part of the feudal system was abolished when personal service was dispensed with for a pecuniary compensation, as early as the reign of *Henry* the *Second*:" but there are several instances of the employment of the feudatory troops from 1190 to 1314, in the reigns of *Richard* the *First*, *Henry* the *Third*, *Edward* the *First*, *Second*, and *Third*; and more particularly in the different sanguinary wars against the Welch and Scots in the time of the *First Edward*. The different kings summoned the military tenants to their armies, on the several occasions mentioned, if the history of these reigns may be credited, as a well-known and constitutional part of the national forces.

This branch of the system was in its greatest perfection for about a century, during the reigns of the Norman princes, but declined somewhat in its state, on the restoration of the Saxon line, and is not to be traced distinctly beyond the reign of *Edward* the *Second*, when it may be supposed to have ceased.

On the decline of the military branch of the feudal system, but more correctly speaking, during the successive changes which it underwent, no slight attention appears to have been bestowed on rendering the principal defence of the nation (the *power* of the *counties*), or as they are otherwise called, the *defensible men* of the realm, more complete and effica-

cious. To this end an act was passed in the 27th year of the reign of *Henry* the *Second*, directing the arms, which individuals subject to the provisions of the statute should respectively bear, and have in readiness at all times, with other general regulations respecting them. After particularly describing the various persons and the arms, in the purview of the act, the statute ordains:

"Every one of these (before mentioned) shall swear that he will have these arms before the feast of St. Hilary, and will bear the fealty to King Henry, to wit, the son of the Empress Matilda; and that he will keep these arms for his service according to his command, and with fidelity to our lord the king and his realm; and no man having these arms shall sell, pledge, nor lend them, nor alienate them in any other manner: nor shall the lord take them from his vassal by forfeiture, gift, pledge, or any other manner."

The purposes of this act were further strengthened or corroborated by the 13th of *Edward* the *First*, called the Statute of Winchester; directing, among other things, some slight alterations in the armour and weapons specified in the act before mentioned.

As necessary auxiliaries to these statutory regulations, commissions were from time to time granted by the reigning sovereign, at discretion, to officers selected for the purpose, to place the inhabitants or the defensible men of the counties particularized, in military array,—which commissions being at first arbitrary in their nature, and found to be oppressive in use, from the introduction into them of new clauses, according to the temper of the prince who directed them, were finally settled by the 5th of *Henry* the *Fourth*, which also ordained, the liberty of the subject being then better understood and secured, that no man should be obliged to serve out of the realm at any time, nor beyond the borders of his own county, but in cases of urgent necessity; nor should

be compelled to provide soldiers, unless with the consent of parliament.

The commissioners, or officers appointed to array the people, were at first temporary, but were succeeded by others of a more fixed character, under the form of lieutenants of counties—who are said to have been first named at the end of the reign of *Henry* the *Eighth*, or in that of his immediate descendent; and to have soon brought the first practice into disuse. Rapin notices those officers in the 12th of *Edward* the *Third*.

Other acts were passed in the 11th and 33d year of *Henry* the *Eighth*, and the 2d and 3d of *Edward* the *Sixth*, enforcing the policy of the statutes of armour in some of their enactments, and more especially in respect to the provision and protection of the horses liable to service, and the encouragement of archery: and for enlarging the scope of the act, by rendering the possessors of certain offices, and the holders of grants and fees of the crown, subject to personal service with the king, and making others, on account of sumptuary indulgences, more chargeable to military duties.

By the 4th and 5th of *Philip* and *Mary*, the statutes of *Henry* the *Second*, and of *Edward* the *First*, were repealed, and another enacted more conformable to the manners and circumstances of the age; by which the armour and weapons, regulated by the preceding acts, were changed for those of modern invention and use; which act remained in force till the reign of *James* the *First*, when this last vestige of the military branch of the feudal system disappeared. Almost at the same instant with these, for they were the heavy superstructure raised on the basis of the military tenure, fell the civil burdens that had bowed down for centuries the landholders to the very ground, and which had been used as reasons, or precedents, to reduce the mercantile and manufacturing classes of the people under a similar yoke. Some few

of these impositions were discontinued, alas, too late, in the latter years of *Charles* the *First*, and it was left to his regal successor, taking care that the demands of the public revenue should not be injured by too rapid and too radical a change, to complete so enviable a work.

It may be observed of the feudal system, that, from its birth to its dissolution, it was the main prop of the military edifice; and that when it ceased to furnish the immediate agents, it still promoted the ends of it, in countless pecuniary aids, usually, and not inexpressively, denominated the sinews of war.

From the period when the statutes of armour were abolished, may be dated the disuse of the *posse comitatus* as an arm of the military strength of the country; though it continues to this day an efficient instrument in the hands of the sheriff, for the suppression of internal disturbances, and for the furtherance of the ends of police.

The cause of the gradual decline, and the final abolition of these national and approved military establishments, was the policy of princes at various periods of our history, in raising, after the fashion of the continental states, stipendiary forces; found, by the important uses which they served, to be better suited to military operations, and to be attended, in the progress of civilization, with less inconvenience to the subject. Stipendiary soldiers, consisting almost wholly of foreigners, and employed principally in the civil wars with the barons, were taken into the pay of the first Norman sovereigns; but British troops of this description were occasionally, but not very generally, used until the reign of *Edward* the *Third*. At this time commissions were issued to officers who had served before, or who were desirous of military service, of a like quality with the beating orders in modern use, for enlisting the required number of volunteers; and in addition to these, private engagements, by indenture, were entered into

by the sovereign and individuals, oftentimes having no military pretensions, for the supply of certain quotas and kinds of troops, appropriately armed, to serve at stipulated wages and regards, and for a particular agreed period—or for a specified service; the amount of the wages depending on the promise of the service, and as it more or less held out the hope of booty, or the capture of prisoners; the price of ransom being a great consideration in these remarkable contracts.

It is not uncommon to observe, in the preserved heap of these indentures, of the times of *Edward* the *Third* and *Henry* the *Fifth*, when the practice was most prevalent, the chief dignitaries of the church, the inferior clergy, and even women (what must have been the effect of such an *influence?*), contracting, in solemn instruments, for the supply of the ranks of the royal armies. Instances are not wanting of reverend prelates having personally led those levies to the field of battle, which they had previously raised; as in the case of William de Melton, archbishop of York, in the 13th of *Edward* the *Second*, to stop the incursions of the Scots; and of Henry Spencer, Bishop of Norwich, in a sort of holy war in the 6th of *Richard* the *Second*. There are writs also in the 4th of *Edward* the *Third*, commanding the archbishops and bishops, it being customary at this time to call out the defensible men on extraordinary emergencies of danger, to cause "all abbots, priors, religious, and other ecclesiastical "persons (every delay being laid aside), to be armed, arrayed, and furnished with competent arms, according to "their state, possessions, and abilities, and these to be arranged into thousands, hundreds, and twenties, so that they "may be ready and prepared (in the energetic language of "the writ), to set forth together with our other faithful subjects, against our enemies within our kingdom, in order, "with God's assistance, to conquer, repel, and destroy "them, and to punish their audacity."

This writ was issued in the anticipation of an invasion from France. Other similar precepts were directed to the same persons, and for the like purposes, in the 46th and 47th of the same king, and afterwards in the 1st of *Richard* the *Second*. But history is silent as to the warlike feats of these clerical legions—nor is there any certain mention of their being at any time embodied; so that possibly the resort to them might have been a sole measure of policy, to draw a present subsidy from the pockets of the clergy, rather than a mean for increasing the number of the army. The fortune attendant on the commands of the *prelate*-generals is sufficiently known, so as not to make them examples or precedents for future guidance, in putting arms into hands unskilled by art, and unfit, from their hallowed destination, for the employment of weapons of destruction.

The method of raising men by indenture was in general observance for more than a century, but appears to have been rarely practised after the accession of *Edward* the *Fourth*. The enlistment of volunteers, by commission, or by special authority from the crown, has never been discontinued, but remains in present force.

Besides the different descriptions of troops enumerated, there were occasional small bands raised by *Richard* the *Second*, *Henry* the *Seventh* and *Eighth*, namely, the serjeants at arms, the yeomen of the guard, and gentlemen pensioners, who were clad in a military uniform, but who dwindled soon after their conformation (and therefore are not included in the regular military establishment) into mere civil attendants, or splendid appendages of the court.

Occasional resort was had to strange resources for the recruit or reinforcement of the army, on especial demands; such as charters of pardon, granted to criminals, on condition of their joining the troops, and the forcible impressment of soldiers for particular expeditions; practices equally

discreditable to the national character, as they are derogatory to the honour of the profession of arms.

Other compulsory and arbitrary processes have been adopted, and not sparingly, both for the raising of men, and of pecuniary and other supplies for their maintenance, by the extreme use of the prerogative; but as these and the preceding courses may be regarded as extraordinary expedients, or as departures from ancient, and, it may be said, more regular usages, they need not be particularized in this place, as they will be immediately noticed, in speaking of the power exercised by the sovereign, at various stages of our history, over the military state and its affairs.

The form or texture of the British armies has undergone, in the interval under contemplation, as summarily explained in the preceding pages, the most material changes, by which its character has been essentially altered; but it will be seen, on further inquiry, that however the force itself has varied, there has been little, if any variation in the power of the hand that governed it, throughout the many and interesting ages wherein it has been followed, and through the manifold transformations to which it has been exposed; but that it has maintained its principal strength, in struggles and adversities where mighty authorities have given way, and still retains as much of its original shape as is consistent with the first principles of the constitution.

The executive authority, so far as records reach, and instruct us, has invariably held the supreme, and almost absolute command over the armies that have at any time been levied for the defence of the realm, or for other military and warlike purposes; and has not been controlled, except in the violence of tempestuous and rebellious seasons, and then but momentarily, in any of the matters incident to the organization application, or direction of the national forces.

The crown has at all times judged, throughout the series of ages under review, according to its discretion, without communication with any other authority, of the apparent or actual necessity for raising armies—the number and quality of the troops to be employed—the time and manner of the exercise of them—the order to be observed in the military bodies—the discipline to be kept up throughout them, and consequently the laws and ordinances necessary to the enforcement of these various objects, and of all others in any way connected with the interior government, and command or employment of the national force; and as related with these, being the conclusion which all armaments must have in view, the right of consulting the occasion, and determining the means of restoring peace. Most of these high and imperial functions yet reside, after several mutations and revolutions in the government, in the unquestionable prerogative of the crown. It has, in anterior times, exercised a much larger rule. It has been suffered not only to embody and retain armies at its own mere will, but has been allowed, by the same single authority, to raise the supplies, and to determine the quantity, and the ways and means of raising them, for the payment and support of the troops, and to exercise an almost unlimited sway in all things, which require not to be detailed, relating to the sustenance and service of the armies. This extraordinary power would appear to have been exerted not only at seasons when the limbs of the constitution had not arrived at their full growth, or when their joints had been accidentally cramped or unstrung; but at periods when they had been confirmed in their strength, and were fresh in youthful vigour—when the parliaments, those sacred guardians of the people's rights and liberties, had ceased to be the obedient registers of the kingly acts, and had assumed a portion, and not an inconsiderable portion of their popular form and spirit, and were fast advancing to that perfection

at which they afterwards arrived. Yet the ample tide of prerogative, sometimes permitted to overflow its boundaries, has not always been strong enough to resist, and has at times been obliged to bend under the current of opposition, which the crown had constantly to meet, in stubborn rencounters with the barons, or the wary and more dangerous encroachments of the church, and oftentimes with both conjoined; circumstances, which may tend to shew, if any illustration were wanting, that the security of the throne depends more on a moderated and equipoised influence, partaking, not predominating in the common authority of the whole estate, than on the plenitude of power deposited in the hands of the sovereign.

A cursory examination of a few historical facts, will explain the natural power of the crown, and the extent of its temporary assumptions over the military affairs of the country.

The Conqueror, and his immediate successor, in the fullness and freshness of dominion, affected not to own restraint in any of the concerns of war. They appear to have kept up at all times within the kingdom, perhaps a necessary precaution for the preservation of their recently-acquired sovereignty, a body of foreign mercenaries, arbitrarily quartered on the subject, and to have drawn forth, at pleasure, the military strength of the country to its utmost capacity; making particular orders of men, such as the possessors of knights' fees, subject to a particular species of service; rendering the clergy, who had been before exempt, liable to personal service, not for the defence of the realm alone, or for the establishment of their authority; but on foreign expeditions and enterprises to Normandy, Bretagne, and elsewhere, apart from national advantage and aggrandizement. Nor were these princes at any time scrupulous, (their great councils, which were summoned at the principal festivals, being courts of

splendour or dignity, not organs of control), as to the creation of funds, when they were not at hand, for the support of their numerous armies. For this purpose they severally imposed, with a very unsparing hand, the most arbitrary and burdensome taxes.

Notwithstanding the ever-growing revenue, arising out of forfeited possessions, and from monies accruing from the alienation of them, with all the producible fruits of the *feudal tenure*; a fertile field, not yet broken up, greatly capable of tillage; and actually cultivated by those princes with industry and avidity; they exercised constant and unceasing extortions. To so great a height did *William Rufus* carry these practices, that Archbishop *Lanfranc*, though a foreigner and a courtier, ventured to remonstrate with him, in the first years of his reign, on the great and alarming enormity of his exactions: but so far from desisting from the indulgence of his passion for accumulation, the king seemed only to have thenceforward redoubled his efforts to fill the royal coffers, and to have respected nothing, sacred or profane, that opposed the realization of his object. He seized and detained for his use the temporalities of the clergy, keeping them vacant during pleasure, and sometimes publicly selling, to the best bidder, archbishopricks, bishopricks, abbeys, and other the first dignities of the church. At the time of his death he is represented, among other valuable preferments, to have had in his hands, as it is significantly termed, the archbishopricks of *Canterbury*, the bishopricks of *Winchester* and *Salisbury*, and twelve rich abbeys. These resources were abundant enough for the subsistence even of larger armies than the princes thought it fitting to keep on foot.

These armies were conducted and led, being a perfectly convertible force, at the will of the respective princes, either to keep the peace of the kingdom, to enlarge its boundaries, to repel invasion, or to promote, if it so suited, the foreign

policy of *Normandy*. Nor did the absolute use of the military, carried, as it should appear, far enough, determine even here; for beyond the internal force of the state, the Conqueror brought into the realm, on several occasions, considerable reinforcements to the foreign mercenaries introduced at the Conquest; and, at one time, in the 19th year of his reign, a large army of strangers, on a threatened invasion by *Canute* the *Fourth* of Denmark; a precedent followed in much later times, though pregnant with too common a hazard. It would not be easy to imagine a more unbounded exercise of the prerogative than is here described.

The succeeding princes did not think it prudent, either from their title to the throne being litigated, or liable to question, to exert so open a rule over incidental military matters, as the sovereigns immediately mentioned: they nevertheless possessed as direct and complete personal authority over the armies, as the more arbitrary of their predecessors; transporting them to the continent, and employing them as implements to enforce their private interests, or to sustain personal feuds, as well as hostilities of a more general and public import. This may be asserted of the reigns of *Henry* the *First* and *Stephen*; who, though somewhat more cautious as to the device or manner of the derivation of their military resources, than the preceding princes, were not over delicate in refraining from, but, they may be said, on the contrary, to have improved on some of the less dangerous expedients, resorted to in the foregoing reigns, for the creation of pecuniary supplies. Forfeitures and confiscations were prodigally extended by them; the feudal impositions increased; and the revenues of the church, opposing no actual or effectual obstacles to their designs, were invaded with as little apparent remorse or circumspection as at any previous date: and this after *Henry*, in his charter, had bound himself to protect the possessions of the church from this scandalous spoliation.

Henry the *Second*, who was doomed to experience, for a large proportion of his reign, an unfortunate and bitter vexation, in unceasing disputes with his own ecclesiastics, and relatively with the papal power, did not neglect any opportunity of providing military means, or of employing the military energies of the country placed at his command; in the progress of which, he exhausted all the sources of supply used by those who went before him, and invented a novel fiscal resource, in the allowance of a commutation of personal service in the field, by the admission of a composition in money, under the name of *scutage* *; indefinite, at first, in its amount, and seemingly without measure in its compass; which was afterwards turned, by an ingenious adaptation, into a never-failing and inexhaustable taxation on the land of those compellable to military service. To this was added a tax on moveables, or personal property, under the denomination of *tenths* and *fifteenths*; being, as the terms imply, numeral proportions of the actual value of such moveables or personals.

The powerful armies, which by these measures were raised, were governed and commanded by great wisdom and with signal success; as evinced in several important acquisitions in *France* and the conquest of *Ireland*. *Henry* had the good fortune to transfuse so much of his own warlike ardour into his subjects, before his differences with the church, that one of his ecclesiastics was induced, the individual with whom his first unhappy quarrel originated, to maintain at his own cost,

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* This may be considered as the principal *war* tax, from this period, and probably it may be dated from the preceding reign to that of *Edward* the *First*. It may be regarded for the most part, throughout this interval, as an arbitrary imposition, at the pleasure of the crown; but in the 25th of the last mentioned king, it was ordained, " that the king should take no aids or tasks, but by the common assent of the realm."

Scutages ceased, being converted into subsidies, in the reign of *Richard* the *Second* or *Henry* the *Fourth*.

in an expedition beyond the sea, six thousand men in arms; *seven hundred* of whom were *knights*. The very capacity of the crown to receive this private aid of the subject, would seem to infer the amplitude of its authority over the province of war.

This king also called forth a part of his prerogative, at the dawn of his empire, in ordering a number of internal fortresses to be dismantled and abated; which had been erected, such are the mutations of policy with the times, under the dictate of a counter-policy by his predecessors. From the circumstances detailed, it may be conceived that *Henry* the *Second* waved not any particle of the royal prerogative, as head of the military body.

Richard the *First* was suffered to engage himself in warlike projects of a most romantic nature, from which no substantial benefit could possibly be reaped by his country, nor any thing, besides a transient military glory, by himself*. Yet for the love of this frail and useless possession, he prosecuted, as did other of our princes afterwards, a distant crusade, at a

* The people, it has been said, had something of an interest, and not a very indistinct one, in the character to be obtained by the prince; and a more near and natural one, in the triumph of the national arms, in the martial circle of foreigners around him, in whose presence such triumph was to be achieved. But was it necessary, it may be asked, to explore in another quarter of the globe an arena; a theatre for the display of British courage; when so many fields for martial exploits presented themselves on a neighbouring shore—on which the skill and bravery of the most warlike nations of Europe were but too frequently exhibited, and in which the British energy and spirit had emulated, in their acts, if they had not surpassed the most consummate art, and most distinguished valour of other warlike people? A field of exercise was certainly not wanting, nor a cause, it should seem, deserving of the exertion of the genuine and native courage of the country. Religious zeal, like other strong stimulatives, might have pushed such courage to an excess,—which would have endangered, but could not have added any thing to its quality. But to speak of religion as a cause in itself of war, and more especially the Christian religion, would be to degrade it, it is feared, to the base condition of human passion.

vast expense of population, and the waste of the substance of the realm. There are those who, in the admiration they pay to military glory, and the value they set on military reputation, are apt to overlook the price at which it is often purchased, that may be inclined to take offence at the freedom with which this celebrated expedition has been immediately described and characterised; and more especially as writers, of a more chivalrous spirit and bearing, have painted it in very opposite colours, and have given to it the most gorgeous and fascinating dress: still it may not be deemed a very singular opinion to hold, that in the utmost success which could attend it, it was hardly worth the strength and wealth of a nation to rear the barren laurel on the dry and arid plains of *Palestine*.

But the extensive armies, and money which were collected and squandered on this unprofitable field of warfare, are not to be so much lamented in this expedition, as the extortionate ways of raising the supplies for the support of it; since they were produced by the exercise of the aggregate of the arbitrary financial practices of the preceding times; by the sale by the king of the crown and privileged lands; of honours or titular possessions to his *own* subjects; and the alienation (it would scarcely be believed in modern times) of important posts and holds within the kingdom to a *foreign* sovereign*; the amplification of the service of knights tenants; the imposition of hidage†, at his sole will, on tenants of an inferior character; and by the multiplication of pre-existing

* *Roxburgh* and *Berwick* were sold to the King of *Scotland* for ten thousand marks, on the eve of the crusade.

† It appears that, in the 10th year of his reign, the King obliged the military tenants to furnish him with a large body of cavalry, for the space of a year, being more than five times the extent of the service to which the knight tenants were ordinarily holden. About the same time, he levied an aid of 5s. on every *hide* of land, a large amount according to the comparative value of money at the time.

fines, as well as by the invention of a host of fresh amerciaments.

The notorious and proverbial exactions of his successor could not go much further, nor could the patience of the people be expected to be tried to a much greater extent, if *Richard's* reign had been prolonged, or the military necessities of the prince less rare. Hence it chiefly happened, that by the repetition and increasing violence of like trespasses on the property of the subject, in the following reign, of longer duration, and more fruitful of warlike events, a strong and continued resistance was engendered, which, at length, set the barons, the most formidable power of the day, in arms against their sovereign; which they consented not to lay down until they had conquered, as we know, for themselves and for the people, the great charter of their liberties. The privileges granted or acknowledged in this memorable charter, reluctantly forced from *King John*, were attempted to be annulled and cancelled by him ere the wax appendant to it had become indurated and fixed.

This instrument gave to the people a short respite, from the pressure of unmeasured taxation, and from aggravated military service of the king's own imposition, compelling, in addition to the established usage, every nine men throughout the realm, to find a tenth at their own charge; but it disabled not *John*, in the last and worst use of the prerogative, from bringing into the kingdom, for the purpose of destroying the liberties to which he had so recently subscribed, a large army of foreign adventurers from *France*, *Germany*, and *Flanders*. This unconstitutional force prevailed but little for the king, or, in a second attempt by his successor *Henry* the *Third*, who, in a like spirit, and with a like defeat, employed the same foreign mercenaries against the natural defenders of the soil.

The latter rash and ill-advised prince, whose infant throne

had been spared by the magnanimous forbearance of the barons, warred more successfully with the civil privileges guaranteed by the charters, than with the feudal strength of his nobles; persisting in his refusal to confirm the *Magna Charta,* until he was induced in the end to sanction it, without the semblance of dignity or grace, partly by force, and partly by a compromise with the barons: and even in the late and unwilling confirmation of this his father's notable act, he excluded from it the clause, which forbade the levying of scutages except by the consent of the great council of the state; and placed this grievous, because ever-occurrent taxation, on the same indefinite footing on which it stood in the reign of *Henry* the *Second.* Filled with the same arbitrary notions which wholly possessed his predecessor, he knew no limit in his demand of warlike supplies, to be exhausted in crude and ill-fated expeditions, or to be wasted in private patronage on foreign favourites; and when at intervals they were denied, he scrupled not to raise them, on his own mere will, by the most exceptionable modes, in the teeth of the refusal and remonstrance of his parliamentary councils. He introduced into the kingdom hosts of obnoxious foreigners; carried away by force the monies of the public treasuries, extorted large amounts under various pretences of loans, gifts, and fines, from individuals, from bodies of men, from cities and corporations, till his exactions were so notorious and flagrant, that they were openly complained of in parliament, and, in the conclusion, caused the barons, and the great men of his realm, to consider him as incompetent to administer the civil affairs of the state, and, finally, to nominate commissioners for the reformation of his practices and government. This naturally superinduced civil turmoils and wars, which troubled the whole of the latter period of this disastrous reign. Yet throughout the long and unhappy course of it, this weak and infatuated prince was left in the

control of the national armies, and so far from any interference being attempted with this part of the kingly power, he was suffered to exert it in no very usual way in the 14th year of his reign, by commanding one man, out of every two plough lands, to attend his service for four days, at the public charge of the village*. In the same year he caused his subjects, from a knight's fee down to twenty shillings per annum, to swear to arms, and to furnish themselves at the country's charge, with munition and provisions for a given number of days. He also levied victuals upon his people, without the consent of his council, for the supply of his armies, going on foreign service into *Gascony*.

Edward the *First* maintained a strict and unimpaired authority over his armies; and, notwithstanding his wise and cautious exercise of power on all occasions, he seems to have carried the prerogative, in military concerns, as far as any of his predecessors. He issued several commissions, to divers persons, to levy fines in lieu of military service in the war in *Gascony*, and again in the war with *Scotland*; fixing the fine at twenty pounds for each knight's fee†. He dismissed his high constable and the earl marshal from their offices, for hesitating to summon the national forces.

To carry on his war in *Flanders* he seized, after a solemn refusal of any aid, all the lay fees of the clergy, until they compounded with him, for the restoration of them, for a fifth of the value of such estates. For the maintenance of the same expedition, he took, not only without the consent, but when the barons had recently denied him a supply, the wool and leather in the mart, then the chief mercantile wealth and source of revenue of the kingdom; and compelled also, from every county, a sufficient provision for his army. These

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* Dors. Claus. 14 Henry the Third.

† Rymer, A. D. 1294, and 1303.

acts of high authority are the more remarkable, as the control of parliaments over pecuniary grants had been much advanced, by the concession of this prince; who first ordained, that no tax should be levied on the people without the consent of the commons. This alone, without the brilliant success attendant on the prince's arms, would have reconciled the people, perhaps, even to greater sacrifices than they were required to make in particular and extreme occasions.

Edward the *Second*, who succeeded, exhibited the same incapacity for rule, the same weaknesses and prediliction for aliens, and carried his favouritism to as great excess as his grandfather *Henry* the *Third*, which brought his government first into contempt, and led eventually to the appointment of a *standing council*, to advise him in his regal duties. He was nevertheless allowed to collect under his banners, when he thought fit, the defensible force of the realm. He demanded the attendance of the military tenants, in the first year of his reign, for an unusual time—and at an extension of charge. He ordered one man out of every town for sixty days, seizing the goods, and imprisoning the persons of those who disobeyed the summons *.

In the twelfth year of his reign, he commanded the *Duke* of *Lancaster* to levy, out of his land, two thousand foot; and other noblemen to raise, according to their ability, similar levies, and at their own cost. Cities and villages were placed under the same circumstances, and five hundred men were assessed on the capital †.

In the thirteenth year, when the standing council had been appointed, he fined in a third of their goods all of those, having forty shillings in land, who made default in their attendance on his summons; for a second default, in the re-

* Rot. Scac. *Edward* the *Second*, dors.

† Claus. and Pat. 12th *Edward* the *Second*.

mainder of their property; and for a third, their bodies to be at the king's pleasure *. He was seen, as often as armies took the field, at their head; personally directing their operations, unabridged in any circumstance of command, until he was reduced by necessity to resign such command and his sceptre, one being seemingly inseparable from the other, at one and the same instant.

The illustrious and busy reign of *Edward* the *Third* commences almost with an example of the use of the prerogative in its greatest latitude, in the introduction into the kingdom by the regency, on the behalf of the crown, of the services of two thousand Flemish soldiers, to assist in the expedition, then carrying on against *Scotland*. The king imposed on the city of *London* a levy of men †, and assessed the several counties in certain numbers of horsemen; dispensing with the attendance of such horse, on condition that the counties furnished him with ratable sums of money, according to their respective assessments, and equal to the value put upon the services demanded ‡; enjoining also the sea-port towns, as had been practised in the late reigns, to supply, and even to build barges, to attend the king's fleet, at their own cost. In the next year, the towns and boroughs were commanded to furnish men, and the military tenants and *posse comitatus* were called out. They of the latter description, who were impotent and infirm, or above the age of sixty, were required to contribute to the charge of the armament, and power was given to arrest the goods of recusants, *tanquam de inimicis*, "as if they were enemy's property." The king possessed himself, by his own mere *pleasure*, of the estates of *Lombard* merchants, and of the priories held by aliens. At other times, he commanded particular persons, by name, to pro-

* Claus. and Pat. 13th *Edward* the *Second*.

† Rot. Scac. 10th *Edward* the *Third*.

‡ Idem.

vide men at arms and archers, and ordered every man of landed property, of the value of five pounds per annum, to find the king one archer. He likewise adopted a mode of raising money for his wars, which had been often used as a financial measure, in preceding times; by summoning the military tenants, having an income of forty pounds per annum, to take upon themselves the honour of knighthood, or to submit to a fine, generally of the yearly rent of their estate.

Sir *Robert Cotton*, speaking of the foregoing charges, or the greater part of them, observes, that they were *legally* assessed, though not by *parliament*, " because divers men procure themselves patents of discharge out of special favour, which could not have been granted if the charges had been imposed by parliament*."

He also remarks, " that after this year (the 25th of *Edward* the *Third*,) these forms and courses were changed totally, and so all following for the most part furnished their occasions for war, by *contracting* with the *nobility and gentry* to find them a proportion of men at certain wages," *i. e.* by indenture, as noticed in an antecedent place. He concludes by saying—" The kings had less reason to charge their people, in this king's time and the following, because they were supplied by *parliament* that was annual."

This laborious and recondite author, makes summary mention of the following instances, as occasions of state, which had led the several princes, in whose reigns they occurred, to lay upon their people charges by supreme power, and not by parliament; videlicet,

" *Richard* the *Second*," he says, " in anno twenty-second, levied horses and cartes, and victualles of his people, for their voyadge into Ireland †."

* This is stated in a curious abstract of Sir *Robert Cotton*, in the library designated by his name, in the British Museum, under the title of *Julius*, F. 6.

† Chron. Walsingham.

"*Henry* the *Sixth*, in his twentieth year, enjoined the persons to attend him in his warres, and dispenseth with as many as would contribute to his occasions. The chardge of two days' expense, if they served in person *."

"*Henry* the *Seventh* mustered his army, partly by benevolence, and partly at his subjects' charge: the distinction is entered on the list †."

"*Henry* the *Eighth* imposed on his people the finding of archers for his warres, assessing some one knight at forty pounds, as Sir *Adrian Fortescue*; and the like in the sixteenth, but at a higher cess, some one knight finding a hundred men ‡; the lords and chief men of every county commanded to attend the king in his warres, some one with fifty men; for the defence of *Calais* in the fourteenth year §, a levy of six hundred archers sessed upon the nobility, clergy, and good townes; in the twentieth, every knight furnishing ten foot at the least."

"A like levy of men in the 25th, some one person being charged with fifty foot and three launces. A proportion I have, at that time drawn (whether acted on or not uncertain), for an army royall to attend *Henry* the *Eighth* into *Fraunce*, in which, on all his subjects from four thousand pounds, land or fees, to twenty pounds in goods, a proportion is set to find for the king's service, proportions of men ‖.

"The late queen, to withstand the Spanish invasion in Ireland, imposed a chardge of horse and furniture upon the nobility, gentry, and her ablest subjects, which was willingly performed accordingly by all ¶."

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* Orig. Instruct. A. 20th *Henry* the *Sixth*, ap. *Robert Cotton.*

† Frag. Instruct. ap. Robert Cotton.

‡ Littera orig. manu Regis, 13th *Henry* the *Eighth*, ap. *R. Cotton.*

§ Orig. ap. *R. Cotton.* ‖ Orig. ap. *Robert Cotton.*

¶ Letters of Council.

The original paper, from which the preceding extract is taken, was drawn by Sir *Robert Cotton*, at the command of *James* the *Second*.

He might have quoted many more authorities, if they had been needful, of the exercise of the power of the crown, in levying contributions on the people for warlike purposes, in the reigns enumerated, which he has forborne to name. It is however to be remarked, that from the accession of *Edward* the *Third*, when the constitution of the parliament began to partake more of a popular form, and to be more clearly defined, the exercise of this power is not so frequently to be noticed, nor so quietly acquiesced in as at anterior seasons. Sir *R. Cotton*, in the foregoing extract, has recapitulated the instances of its exertion, in the inclusive reigns between *Richard* the *Second* and Queen *Elizabeth*, which will be pursued, after the same brief manner, to the eve of the civil wars in the reign of *Charles* the *First*.

James the *First* raised large sums of money by the grant of hereditary honours, for a pecuniary compensation, equal to the maintenance, as it was calculated, of thirty foot soldiers, for the space of three years *: by the encouragement of monopolies; by enforcing penalties on those who would not accept the honour of knighthood; and by exacting large benevolences in the twelfth and subsequent years of his reign, for purposes or pretences, which were not intended to be fulfilled; as in the expensive demonstrations for the recovery of the palatinate †.

At the commencement of the reign of *Charles* the *First*, that prince published a proclamation, commanding all persons possessed of an income of forty pounds per annum, issuing out of land, to take upon him the honour of knighthood; but, afterwards, received a large composition in the lieu of it.

In the second year of his reign, after the dissolution of parliament, he ordered, by the act of his privy council,

* Hence originated the title of baronet in 1611.

† See *Rapin*

customs to be levied, without any settlement of their amount, or any previous authority of parliament.

Ports, and maritime counties, were commanded to furnish and equip ships; *London* being assessed for twenty vessels. Ship-money was afterwards demanded, in the tenth year of his reign, in the stead of ships, and was exacted from all counties and places indiscriminately throughout the kingdom, whether maritime or otherwise.

Soldiers were billeted in private houses; and under the denomination of loans, large sums were required of the people in the second year of the king's reign, for the assistance of the *King* of *Denmark;* and they, who refused to comply with the requisition, were either imprisoned or enrolled for soldiers.

Tonnage and poundage were arbitrarily imposed. Coat and conduct money, and other military impositions, the detail of which would be tedious, were laid, at pleasure, on the people.

The privy council and the peers exhausted their credit, in soliciting and procuring private loans for the use of the king.

By an order of council the counties were, at several times, called upon to raise their respective quotas of troops, and commissions of array were sent into every part of the country †.

In the free use of the military means of the kingdom, the king appears to have ordered troops raised for one purpose, to another quite remote from it ‡. He disposed also of a force, raised and assembled by his direction in Germany, to the *King* of *Sweden* and the *Duke* of *Savoy:* and in the first

† All of these, and many other instances of the exercise of the supreme power of the crown, by this prince, are noticed particularly by *Rapin*, and other historians.

‡ He recalled in 1626, six thousand foot soldiers from the United Provinces, and sent them to Denmark.

year of his reign, he lent six large ships of war to the *King of France*, during the adjournment of parliament, to serve *against* the *Protestants* at *Rochelle*.

To these and many other acts of power, in relation to the employment of the national force, for most of which some general precedents might have been found in preceding reigns, the other estates of the kingdom would probably have been inclined to submit, if they had not been attended by frequent intrusions on the province of the other branches of the legislature; and especially the house of commons: which, at this time, having grown into consequence, by the personal influence of its members, as well as by the ascertainment of its privileges and the acknowledgment of its due legislative authority, circumstances not sufficiently in the contemplation of this or the preceding sovereign of the *Stuart* line, had introduced a nascent strength into the constitution, through the medium of a seasonable control, operating to the prevention of the excess or abuse of power, in both or either of the other branches of the legislature, and therefore entitled to the peculiar attention of the monarch, who seemed to have entirely disregarded it. Now to the extreme use of the military prerogative, this ill-advised prince added the exercise of the widest and least defined, and not unquestionable part of the kingly authority in civil regulations, in the instances previously mentioned; so as at length to create a doubt of the extent, and next, to induce a resistance of that portion of the royal prerogative over military concerns, on which no question had been ever antecedently entertained; and finally, to occasion a civil warfare; which obscured and disfigured for awhile the whole face and beauty of the constitution, and, under the sacred name of *liberty*, introduced a more complete despotism than had at any time been experienced in the worst seasons of British history.

It would be in vain to look to this æra, when opposed au-

thorities stood on the extreme confines of their real or imaginary power, for precedents to guide us in search of the true limits of the prerogative. It is to be noticed, that, in the violence of these distempered and distracted times, the first causes of discontent, and which had more of the appearance, and indeed reality of grievance in them, were soon dismissed from men's thoughts and tongues, and others assumed and aggravated into sounding evils, which were of a shadowy and very disputable quality. Thus the extraordinary civil burdens, placed upon the people, were lost sight of, and the principal hostility directed against the exercise of the supreme military power of the crown, not so much on account, as it should seem, of any new or great inconvenience experienced from it, as from a desire to bring such power into disrepute, so as eventually to afford an excuse for divesting the crown of its sole safeguard against popular usurpation or encroachment. But from the numerous authorities quoted, it may be seen, that the Kings of *England*, at all times since the Conquest, have held almost an unbounded sway over affairs immediately or collaterally related with the national force. In many of the instances, in which such power had been exercised, such as in the demand of aids, and in a variety of pecuniary impositions, its authority had been questioned, and in several others, it might be supposed to have been questionable.

It would not serve any good purpose to proceed to a minute examination of any disputed or disputable exercise of the regal power in this behalf; since a different order of things has succeeded, which renders it highly improbable, that a reference will be made to these distant times for example or instruction. Yet notwithstanding the opposition to, on some occasions, and the doubt that might be entertained of the legality of the exercise of this extreme power of the crown on others, it may be inferred, from the unbroken

and uninterrupted stream of precedents, which shew the use or employment in *fact* of the various species of control and government over the armies of the state, that a power, nearly arbitrary, in military affairs, has been understood to reside, during the long interval described, in the hands of the executive. But, be this as it may, no doubt has at any time prevailed, except at a season when a general distemper pervaded every rank and order of the people, of the supremity of the crown over the military body.

The same reasons that govern every other executive act, to be performed for the benefit of the state, apply with additional force to the military proceedings of the country, and demand that the whole shall be directed by the royal hand. Hence has resulted not only a promptitude, energy, and efficiency in action, but an indispensable ingredient in all military success, a singleness and unity of design. How far this military prerogative has been carried, by different sovereigns, has been exemplified in the several acts which have been antecedently noticed.

Not wishing to dwell on the exertion of the prerogative, in uncertain or doubtful cases, it may be sufficient to remark—

That the crown has, at all times, maintained a sole and indisputable authority in every matter direct or incidental to the state of war: either in continuing, relaxing, or determining its existence:

It has alone decided, when and against whom hostilities should be commenced, the manner in which they should be waged, and the force, of every description necessary to be employed, in giving them the due effect:

With the crown it has been also left, on its mere discretion, to summons forth the whole military strength of the kingdom, or to draw on it for such levies as it should deem sufficient, under circumstances, for foreign or internal, for near

or distant warfare; to marshal such levies into convenient bodies; to commit them to the government of proper officers, superior and subordinate; reserving to itself, as the source whence all military promotion emanates, the supreme command and direction of the whole:

And as connected with the fulness of the kingly authority over the military state, to the crown it has always belonged to make laws or ordinances for the œconomy, discipline, and government of the army: and to appoint and erect tribunals for the administration and enforcement of them throughout the same.

Large as this branch of the prerogative undoubtedly is, liberally as it has been used in all times, and prodigally as it may be thought in some; yet the virtue of it has ever been respected, even in occasional excesses, and it has had the singular good fortune to pass through several ages, not only unmolested, but unchallenged.

In the mixed form of government, distinguishing the British constitution, it would seem impossible to commit this power to any other estate, without throwing out of their planetary spheres, those grand gravitated bodies, which have been so long and so happily held together by equipoised attractions and oppositions; preserving each in its respective freedom of motion and action, and preventing a collision by undue approach, or encroachment of any of the distinct organs, which might destroy the characteristic harmony of the whole.

Never, but in a wild and fatal experiment, has any attempt been made to sever this authority from the possession of the crown; and then instantly and consentaneously succeeded the subversion of the entire constitution. The seizure of this branch of the prerogative from the hands of the unfortunate and ill-fated sovereign, *Charles* the *First*, discovered, in the very act, that such prerogative could not be exercised

by any other than the crown, without the annihilation of the distinctive character of the government. The use and end of this prerogative was immediately perceived to consist in the unity and indivisibility of its nature; for the moment it was separated into parts, its essence was dissipated. It set at liberty the whole military community from restraint, and put it into the government of hands, inexperienced, and unequal to its management.

The usurpation of the supreme power over the national armies by the parliament, induced, as might be foreseen, a rapid infringement on every one of the kingly functions, to the destruction of the monarch, and the monarchy, drawing along with it, as a necessary consequence, the overthrow of the house of peers, and finally diminishing, not adding any strength to the commons themselves, by destroying their independence, through the creation or introduction of a power, used, unhappily, for the temporary enslavement and supercession of the co-estates, without considering its tendency, in the end, from a spirit of anarchy in the army, and base ambition in its leaders, to become an instrument of wicked and deadly mischief, one after the other, to every legitimate organ of the state; and substituting in the stead of their united, liberal, and tempered rule, a complete military despotism. This wide mischief was produced, in an avowed intent of abridging and limiting the executive in its dominion over the army; and ended, as it has been observed, not only in the utter change of the constitution, but in placing in the power of the executive, under a new name, as much, if not a greater military authority than it had at any time previously possessed. So that the whole that was effected, through the most calamitous and deplorable events, was a mere personal transfer of power, demonstrating afterwards, in the return to first principles, the madness of the declination from them.

The innovation was too violent in itself, and too pernicious

in its effects to endure long; for the parliament at the restoration was as eager to acknowledge and restore to the crown its just and well-established authorities, as its predecessor had been zealous in stripping it of its natural and necessary functions.

In the thirteenth nominally, but in the first year of the actual reign of *Charles* the *Second*, it is emphatically declared by statute,—" that the sole supreme government and command of the militia within all his Majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, ever was and is the undoubted right of his Majesty, and his royal predecessors, Kings and Queens of *England*, and that both or either house of parliament cannot, nor ought to pretend to the same."

Within the sweep of this extensive power, Judge *Blackstone* considers to be included in the prerogative of the king, in his capacity of general of the kingdom, the right of *erecting*, as well as manning and governing, the forts and places of strength within the realm, assigning, as a reason for such opinion, " that all lands were formerly subject to a tax, for building a castle, where the king thought proper." But with the failure or removal of the provision, the corresponding duty may be supposed to have surceased*.

The amplitude of the power of the crown, as described in the statutory declaration of the 13th of *Charles* the *Second*, has not been moderated in practice, or in any material degree narrowed, or limited in principle, by any subsequent act of the legislature, except in some particulars, of no very essential importance, which will be afterwards mentioned; wherein it has been deemed necessary to interpose some changes,

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* *Henry* the *Eighth*, in the thirty-first year of his reign, made a progress round the coasts, and in apprehension of an invasion, commanded forts and redoubts to be built in several places. The Parliament afterwards made provision for the expenditure.

from mutations which have taken place in the constitution of the armies, and the consequent policy to be adapted to their government. If these shall be imagined in any respect to take from the extent of the regal authority in military concernments, it is more than compensated in the latitude or extension of its duration, from the more permanent existence of our armies.

Having shewn the condition of the military state of the realm, from the Conquest to the Restoration, and the rule or command to which it was subjected, I next propose to consider, in a separate chapter, the ordinances or laws, with their peculiarities, by which it was governed throughout the same interval.

CHAPTER III.

Of the ancient Rules and Ordinances for the Government of the Military State.

THE military state of the kingdom, at the periods here considered, large and comprehensive as it was, progressively embracing the whole population of the country, had yet nothing of a fixed or established quality attached to it; the members of it, associated for a given time or purpose, being dismissed at the conclusion or accomplishment of it to their original condition.

As military service was at this time obligatory, as well as temporary, a jealousy and watchfulness naturally existed in every member of the community liable to its exigency, against extending the term of it, or giving to the military association a stationary and settled form. An association so constituted could scarcely be regarded, from its very composition, as a fit object of public law, which applies itself to men in an universal and permanent relation, and not, as here, in an occasional and evanescent character. From the nature, therefore, of the military state, as well as from the jealousy entertained of it, few provisions of a legislative force would appear to have been made or requisite for its government; and these will be discovered, on examination, to have a national policy in their view, more than the regulation or protection of the military community, as a separate body. Nor, for other reasons, growing out of

the nature of the military institution itself, as known and tolerated in these realms, would it seem to have been necessary that the legislative power should concern itself in framing constitutions for the government of the army.

It must not, from these observations, be concluded, that the great bodies, of which the armies at all times consisted, could be left for an instant unrestrained by the operative power of law. On the contrary, they would seem to have required a more strict and prompt restraint, than could be provided or imposed by ordinary legislative means. A numerous and distinct order of men, incorporated for the purposes of aggression as well as defence, confined not to one spot, but moveable at the command of an appointed superior; now acting within the body of the kingdom, and at other times carrying the vengeance of the country into the heart of the enemy's territory; their relations constantly varying with their place; and their actions, as their motives, governed not by their own inclination, but by the will of another, depending on a discretion, taking its direction from the state or appearance of surrounding circumstances; such an order of men is not to be ruled, it should seem, by the common principles applicable to a regular and settled society. The success of every military enterprise must rest, in this condition of things, on the exercise of the due discretion of the superior, whatever denomination he may bear. He has the fortune or fate of the army, from his complete disposal of all its actions, entirely within his hands; and having so great and necessary a trust committed to him, it would not appear extraordinary that there should be confided to the same power all the means that are requisite for ensuring the end of command, for enforcing the discipline and obedience of the military body to the will of the commander. As the command of the army is an act at all times of executive authority, it could not be separated, on prin-

ciple, from the hand intrusted by the constitution to perform the general and ordinary executive acts. If the prerogative has been at any time bounded or circumscribed in its exertion, the limit will be found to have been interposed, not from any question of the propriety or lawfulness of the prerogative, but from the change in the constitution of our armies, and from a necessity acknowledged by the crown, in concurrence with the co-estates of the realm, in conforming its powers to the varying exigencies of things.

Many of the rules and ordinances of war made by the reigning sovereign, in his character of generalissimo of the national armies, for particular services or occasions, have been officially preserved; some of which in explanation of what has been immediately advanced, may be not unusefully mentioned; as they tend to shew the scope of the royal authority over military matters and persons, coming within the body or precincts of the camp. These were made, as it will be seen, by the king of his mere motive, though calling to him not unfrequently, out of grace, or especial favour, the advice of eminent personages, either remarkable for their skill in warlike pursuits, or for their general or professional learning.

The first noticeable regulation on record, referring to the military, is the *charter*, as it is called, of *Richard* the *First*, addressed "to all his men, going by sea and land, to Jerusalem;" which purports to have been made in the first year of that monarch's reign, for the emergency described. It is short, but sufficiently pertinent; and seems to have been framed for the purpose of preserving a good understanding and fellowship among the members of the opposite services, military and marine, during the voyage to the Holy Land; and the places, at which they might intermediately touch for refreshment. The brevity of the ordinance will excuse the

insertion of it, at the bottom of the page, as it exceeds not the common compass of a note *.

It denounces death, under unusual and aggravated forms, against particular offenders, known to and punished otherwise by civil tribunals; also dismemberment, fine, ducking, expulsion in a foreign land, and other infiictions, on delinquent soldiers and sailors, of a cruel and arbitrary kind; which could only be tolerated, under the idea of their being requisite, in these less civilized times, for the maintenance of discipline and order among unruly subjects. This charter was made, as it appears, by the king, and the common council of all good men, but as it was executed beyond the realm, in a foreign territory, it could not have been made in concert with the usual council, co-assistant with the king in the enactment of the public statutes.

The military regulations, next in order of date, are of the

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* *Made at Chinon*, 1st *Richard*, 1189.—Charter of *King Richard*, for the government of those going by sea to the Holy Land.

" *Richard*, by the grace of God, King of *England*, Duke of *Normandy*, &c.—To all his men going by sea to *Jerusalem*, greeting. Know ye, by the common council of all good men, we have made the underwritten ordinances.

" He who kills a man on ship-board, shall be bound to the dead man, and thrown into the sea; if the man is killed on shore, the slayer shall be bound to the dead body and buried with it. Any one convicted by *lawful witnesses* of having drawn his knife to strike another, or who shall have drawn blood of him, to lose his hand. If he shall have only struck with the palm of his hand without drawing blood, he shall be thrice ducked in the sea. Any one who shall reproach, abuse, or curse his companion, shall, for every time he is convicted thereof, give him so many ounces of silver. Any one convicted of theft, shall be shorn like a champion *, boiling pitch shall be poured on his head, and down of feathers shaken over it, that he may be known, and he shall be set on shore at the first land at which the ship touches."

* Champions hired to fight legal duels, in cases of murder and homicide, had their hair clipped close to their heads.

ninth year of the reign of *Richard* the *Second*, and are entitled "The Statutes, Ordinances, and Customs to be observed in the Army *." These were ordained by the king, in consultation with his *seneschall*, *high-constable* and *mareschall*, and with other *lords*, *earls*, *barons*, *banneretts*, and *experienced knights* (not named) "whom" the King and his high *military* advisers, as in the title of the statutes or ordinances is declared, "have thought proper to call unto them;" indicating most clearly, that they were a select and chosen number of counsellors, and not necessary parties to the framing of the ordinances.

The war statutes of *Henry* the *Fifth*, mentioned by Upton, "*de re militari*," were made at *Mans*, with such peers, lords, and nobles, as were present with the king, preceded by this noticeable preamble: "The clemency of the great Creator disposes those under him to be modest, peaceable, and chaste; nevertheless because unbridled avarice, the enemy of peace, daily generates so many new causes for disturbance and litigation, that unless its efforts are repressed by the force of justice, and the sense and intricacy of its questions resolved, all Christian rules for our army would be destroyed, and that common good, for which we live and reign, extinguished. Therefore laws and constitutions are ordained, that noxious appetites may be confined, under the rule of justice, by which mankind are informed how to live honestly, without injuring each other, rendering to every one their right. And that our army, as well in peace as war, may be led in the proper path, and the said common good preserved entire; and also on the other part, that the constable and mareschal of our said army may judge and determine the more prudently, in the causes daily brought before them; we have,

* These statutes or ordinances are among the number of the *Cotton* M. S. in the British Museum, under the title *Nero*, D. vi.

with advice of our peers, lords, and nobles, made certain constitutions, promulgating the same in our army by public proclamation, enacting, that all and every one of the captains in our said army, shall have these our said constitutions in writing, that our publication may be considered as a sufficient warning, and that all those concerned may not pretend ignorance of the said constitutions."

Who the peers or nobles were, that aided the king with their advice or counsel on this occasion, are not described, but in all probability they were vested with military offices, and atached to the expedition then on foot.

Another ordinance of the same prince was issued in his own name and of his pure authority, directed to the *captain* of *Rouen* and his lieutenant *; which relates, among other things, to the œconomy of the garrison intrusted to his charge, and the conduct to be observed by him towards the inhabitants in the vicinity of the fortress. This ordinance originated in military exactions supposed to have been practised by the military commandant, and abuse of his judicial functions, in the administration of justice; which would appear to have been a general cause of complaint against local commanders then on the Continent, as in the next month a commission of inquiry was directed to Sir *I. Radcliffe*, knt. ordering him to visit all towns, castles, and fortresses, in his progress, and to inquire—

"In what manner the captains, governors, constables, officers, and soldiers, thereof, behave towards the King, in the careful keeping and government of these places, as to the people thereof, and the king's other liege subjects of the parts adjacent.

"And particularly to inquire respecting extortions, pillagings, robberies, impositions, appaticesments, and other un-

* Rymer, tom. 10, p. 106.

due actions by them, as it is said, done and perpetrated, and whether the said captains have done or attempted any thing, contrary to the king's admonitions, prohibitions, ordinances, and mandates, so repeatedly directed to them, and also many times proclaimed by the bailiffs.

"And what jurisdiction or authority in criminal cases, and also in transgressions by their soldiers, or others, they have exercised contrary to the king's ordinances, or more than they are legally entitled to *."

There is also extant an ordinance of *Henry* the *Seventh*, made before the battle of *Stoke*, in the second year of that sovereign, with the advice of the *archbishop* of *Canterbury*, the *bishops* of *Winchester* and *Exeter*, all other temporal lords, and others the king's counsellors, *then present*, which from its address, style, and scope, bears the full semblance of a common proclamation, which it indeed purports to be. It commences—"And when the king had thus prepared and ordeyned his hoste, he ordeyned his *proclamation*, for the good rule of his hoste, by the advice, &c." And then proceeds—"The King our sovereign lord, doth straytly charge and command," and pursues the same imperative strain to the end.

Henry the *Eighth*, previous to his embarkation on an expedition against *Francis* the *First*, in the year 1544, made, of his own will and authority, some very copious rules or regulations for the army, then assembling—under the description of "Statutes and Ordinances for the Warre." After reciting the necessity for the observation of laws and good order in times of war, as well as of peace, the titles of his majesty, and of his intention to invade France in his royal person during the summer, the instrument proceeds: "His Majesty, minding due order to be observed and kept among

* This commission is to be found in Rymer, tom. 12, page 112.

"all sortes of men of his highness's most royal and puissant army, as well captayns, souldiers as others, in such wise as apperteyneth both towards God and the world, hath devised and commanded to be set fourth certayne ordinances and statutes for the warre, as hereafter ensueth, &c. &c." Then follow the articles, under distinct heads.

The last article, being the fifty-fourth, contains an exhortation to the army, to conform themselves to the ordinances, setting forth the disinclination of the king to carry the punishments prescribed by them into effect, but in the event of their being unheeded, "though it be of the greatest heaviness and displeasure, yet must he of necessity, when the case it requireth, see the said statutes executed, and the offenders punished."

At different times, the generals of the army for the time being, have been empowered, by particular commission from the king, to make rules and articles of war. A commission of this nature was granted in the time of *James* the *First*, in 1622, wherein he authorizes Sir *Horace Vere*, captain-general of the army, intended to be sent to the palatinate;

"To make and proclaim ordinances of war, for the government of the army, and to enforce the observation thereof*."

A commission to the like effect was given by *Charles* the *First*, in 1640, to *Thomas*, earl of *Arundel*, captain-general of the army, to be employed at home, empowering him to make laws and ordinances for the government of the forces, and to appoint a provost martial, to use and execute the martial law †.

At other times the captain-general, on a particular service, would seem to have made articles for the observation of the forces committed to his charge, by virtue of his com-

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* See Rymer. † Rymer.

mand, and without any commission to that effect; as in the instance of the *Earl* of *Northumberland*, in the 15th of *Charles* the *First*, 1640, who printed and published, officially, a code of military regulations, under the title of "Laws and Ordinances of Warre, for the better Conduct of the Service in the Northern Parts, by his Excellence the *Earl* of *Northumberland*, Lord-general of his Majesty's Army and Fleete." In the oath enjoined by one of these articles, the soldier is, among other things, required to swear

"To obey the lord-general, and the commanders and officers under him; to observe the laws and ordinances of warre established by him."

A code, differing very little in its provisions with the one last mentioned, was published a short time afterwards by the *Earl* of *Essex*, as lord-general of the parliamentary army, and would appear to have been issued by virtue of such his office, entitled, "Laws and Ordinances of Warre established for the better Conduct of the Army, by his Excellency the *Earl* of *Essex*, Lord-general of the Forces." In the exclusive permission, granted to the printer by the Earl, to print and publish these ordinances, they are described, "The Laws and Ordinances of War by *me* established, and of late enlarged by *my* command, for the better conduct of the Service," which would infer that they were made of his sole authority.

It is clear, from what has been observed, that the kings of *England*, for many centuries, have exercised a supreme and unlimited command over the military state of the kingdom; and, as a sign of the unbounded nature of the royal prerogative in this respect, have dictated at their pleasure the laws and ordinances by which it should be immediately governed. If in framing constitutions for the army they have at times availed themselves of the advice of high official personages, of certain peers or nobles, whose rank in early times would

seem correlative with or tantamount to military office, of eminent churchmen, in whom all professional learning then centred, and of bannerets and others of less degree, having stations and reputation in the army—this circumstance bespeaking, as it does, the grace and peculiar caution of successive sovereigns in the exercise of the prerogative, does not in any way impugn or question the principle on which it is founded; as none of the several counsellors, at any time advised with by the respective kings named, nor the whole together, formed such a body as could be recognised by the constitution as a competent organ of themselves to enact or declare the law. They constitute not in fact the legislative power of the kingdom—nor do they affect it in pretence; but appear to be acting, on the summons, *ex gratiâ* of the crown, and to be aiding it, as they were bounden, with their best council. It is to be remarked, that the prerogative is then most wide and uncontrolled, and most freely and liberally used, as the constitution advanced towards perfection, and as the other estates of the realm claimed and asserted their right to participate in the whole function of legislation. Thus we see *Richard* the *First* and other sovereigns, possessed of the most plenary regal power, and inclined to carry it to its full bearing, desiring and availing themselves of the assistance of council to guide their discretion in framing their military regulations; whilst *Henry* the *Eighth, James,* and the *first Charles,* exercise the prerogative in its greatest latitude, and without the intervention of advice.

It might, on a first or hasty impression, be supposed, from the prodigal and excessive use of the military prerogative in general, by the last-mentioned sovereign and his two immediate successors, which was questioned and resisted, that it was doubtfully exerted in the peculiar province of legislation for the government of the national armies; but what-

ever reason there might be in denying its competency in other particulars, in which it was obnoxiously used, such as in raising arbitrary supplies for the maintenance of the army, and in quartering the soldiery on the subject, and some other unusual courses, there would not seem to have been any question, nor could any possibly be entertained of the power of the crown to make and declare military ordinances, until the command of the militia, or the military force of the country, was divorced from it by an act of assumption of what was then called the parliament; and which act was afterwards, at the very dawn of the Restoration, pronounced, as has been explained in another place, unwarranted and unconstitutional, and followed by a declaration directly negatory of such assumption;—" That the sole supreme government and command of the militia, within all his Majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, ever was and is the undoubted right of his Majesty, and his royal predecessors, Kings and Queens of England, and that both or either house of parliament cannot nor ought to pretend to the same." In the description " of the *supreme* government of the militia," would seem to be recognised, as strongly as terms can denote, the principle of framing such rules and ordinances as should be necessary for preserving order and discipline in the army, as reduced into practice by the various sovereigns in the examples immediately shewn.

The exceptions afterwards taken to the full authority exercised by *Charles* the *Second* and the *second James*, which eventually ended in the entire change of the military system, and of the new modelling of the power of the crown in respect of the army, so as to render it conformable to existing circumstances, did not at all turn on the policy of leaving in the royal possession the power of dispensing laws to the army, so often as there should be a necessity for em-

bodying the forces of the kingdom, but on the retention of an embodied force, at *all* seasons, whether warlike or pacific; so as to lay the foundation (a formidable instrument in a single hand, and ever jealously regarded!) of a perpetual and standing army.

So far from any ill opinion having been conceived by the other estates of the kingdom of the prerogative here considered, it would appear, that they have cheerfully lent their power to help and aid the crown, whenever it has been required, to promote its fair ends. This comity of the other branches of the legislature has been evinced in certain legislative acts, which may be briefly adverted to, for the purpose of shewing that they had not any tendency to trench on the kingly power, but on the contrary, to extend its influence so far as it seemed politically advisable.

The first of these is of as early a date as the reign of *William* the *Conqueror*, requiring the oath of those liable to military sesvice, "that they will be faithful to their sovereign Lord the King *William*, within and beyond the "entire kingdom of England, and serve with him every "where with all fidelity, in the defence of his lands* and "honours, against internal and foreign enemies."

There is another transcript of a statute of the same sovereign in *Wilkins's* collection, of a subsequent date, which commands and enjoins, speaking in the name of the king, "all knights, and others subject to knight service, "that they shall have and possess at all times suitable arms "and horses, and that they may always be ready and pre-

* This law is supposed by *Judge Blackstone* to have been made at *Sarum*, at the introduction of the feudal system. It is extracted from the 52 cap. *Wilkins*, 228. "Statuimus, ut omnes liberi homines fœdere et sacramento affirment, quod intra et extra universum regnum Angliæ, Wilhelmo regi domino suo fideles esse volunt, terras, et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere."

"pared for the fulfilment and performance of their entire "service to us, when occasion shall require, according to "what they are bounden in duty and of right to perform to "us, for their respective feuds and tenements, and as we "have ordained for them by the common council of our "whole realm aforesaid*.

The provisions or directions contained in these ancient statutes, regard not men in actual military association, but in preparation for military duty, incumbent at these times upon all. The statute of the 27th *Henry* the *Second*, called the *assize* of *arms*, and the *statute* of *Winchester*, temp. *Edward* the *First*, and the 4th and 5th of *Queen Mary*, may be viewed in the same light. The first of these acts regulate the armour and arms, with which every individual should furnish himself, and at all times have in readiness according to his degree or estate; declaring such arms and armour to be exempt from forfeiture to his mediate lord, and to be transmitted as a heriott to the next heir; and giving to the itinerant justices authority to enforce the provisions of the act. The *statute* of *Winchester* is to the same effect, ordering in addition a view of armour twice in every year by two constables in every hundred, requiring a report to be made of all defaults, which was afterwards to be presented by the justices assigned to parliament.

The 4th and 5th of *Mary*, pursuing the policy of the statutes of armour, is satisfied with adapting their provisions to the circumstances of the times, by changing the arms, pre-

* This is quoted by the last-mentioned learned Judge from Co. Litt. 75, 76, and by him taken from the 58. chap. *Wilk.* 288, of the following tenour:—

"Quod habeant, et teneant se semper in armis et equis; ut decet et "oportet, et quod semper sint prompti et parati ad servitium suum in"tegrum nobis explendum et paragendum, cum opus adfuerit, secundum "quod debent de fœdis et tenementis suis de jure nobis facere, et sicut "illis statuimus per commune concilium totius regni nostri prædicti."

scribed by the foregoing statutes, into weapons and armour then in daily use.

Thus far the statutory regulations may be considered to supply what was wanting in the prerogative; i. e. a power to keep the military subject in a state of readiness, whensoever he might be called upon to perform his military duty, for the defence of the realm; the statutes conducting him, as it were, to the borders of the camp, within the jurisdiction of the crown, and there leaving him to be disposed of by the authority inherent in it.

Other statutes, founded on a similar policy, were afterwards enacted, with a view to maintain the entirety of the king's forces in efficiency, as well as amount, by checking certain abuses of officers, who had contracted to furnish a given number of men; and of others, who had mediately engaged to serve in the king's armies in a special course of service agreed upon, and for a time specified. *Some* of these, such as the 7th of *Henry* the *Seventh*, confirmed by the 3d of *Henry* the *Eighth*, compelled captains, contracting for the supply of a certain quota of men, to keep up their respective lists, under pain, on any default, of imprisonment and forfeiture of all their goods and chattels to the king*, and extended the like penalty to those who should hold back any part of the wages of their men or soldiers, beyond the authorized and licensed stoppages for clothing, described in the act.

Others, such as the 2d and 3d of *Edward* the *Sixth*, tend to the suppression of frauds, then commonly practised by soldiers, in selling or changing the horses and armour, with which they had been appointed and sent forth to serve the king in his wars, to the great loss of those who furnished

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* The 3d of *Henry* the *Eighth* exonerates such captains from the penalties of this and the preceding act, as shall certify to the king's lieutenant within ten days after the event, as it may happen, of the departure or lack of such soldiers as may be wanting to make up the stipulated number.

such men with their equipment; giving power to the lieutenant, high-admiral, vice-admiral, warden, or any of their deputies, to imprison the said offenders, until they should make complete satisfaction. The offence, meditated here, was one, occurring, as it should seem, between the time of the engagement to serve, and the actual junction of the party with the army. The last-mentioned act also imposed a severe penalty on those captains and other officers who should grant discharges to their soldiers without leave of the king's lieutenant.

The next material interposition of the legislature was to extend, not the limits of the prerogative, but the policy on which it was founded—by committing to the civil courts a concurrent jurisdiction with the military tribunals, over certain offences of a military description; continuing thereby the legal remedy or punishment, which would otherwise have failed, or been deficient, from the temporary nature of the ordinary military jurisdiction; taking up the authority in military offences, where the power of the crown would seem to cease, or where it is not in itself sufficient.

The acts, antecedently considered, relate chiefly to parties before they enter the military state, to the end of preserving them in readiness for service; or, having entered it, to keep them, while in it, in a state of efficiency; those which are now about to be noticed, have regard to men, who, having been once enrolled and numbered in such state, depart or temporarily withdraw themselves from it of their own act, or without a competent permission. The acts, alluded to, are those providing against *desertion.*

The first is of the 18th year of the reign of *Henry* the *Sixth,* declaring the offence to be a felony. This act, as the preamble shews, was made for the purpose of correcting a great prevalent mischief, immediately felt, arising out of the manner in which the armies were then raised, namely by

indenture, or the particular engagement of individuals to supply a certain quota of men, according to their respective undertakings. The men, thus furnished for a given term, having received the whole, or part of their wages, of their captains or masters, as the preamble recites, "had deserted "and gone where they would, long before that term was "expired, whence great damage had arisen to the king "and the whole realm."—The statute then proceeds to enact,—"that every man so offending, unless compelled by "sickness, in which case he should repay his wages, in "order to furnish another in his place, shall be punished "as a felon." The inquiry into and punishment of the offence was left to the justices of the peace.

As the members of the military community were engaged only for a stated time, or a particular expedition, and the extraordinary power of the crown, in the government of the armies, existed only for the period whilst they should be embodied; such power must always have been to a certain degree insufficient for the punishment, by its substantive authority, of this particular crime, it being easy for those committing it to elude apprehension, by the concealment of their persons, until the term of service, or the expedition should be concluded; when either the authority to pursue the offence, or the means, through the defect of a proper tribunal, or both might possibly have been wanting, for prosecuting it with due effect. Hence the legislature is required to lend its hand for the cure or supply of the defect in the power of the crown as to this particular offence.

What judicial cognizance the *court* of the *Constable* might have had of military offences in time of peace, at the date of the 18th of *Henry* the *Sixth*, cannot be exactly discovered; but at no time, it is apprehended, did it possess an authority ample enough to award such a punishment, as was thought adequate to the serious character of the crime which the sta-

tute attaches to it. Such court had certainly no jurisdiction in extreme cases—for there is a memorable instance, in the time of *Edward* the *Third*, of the reversal of the attainder of the *Earl* of *Lancaster*, who had been condemned in the preceding reign by martial law, on the express ground,—that the attainder had been procured in time of peace.

In the Institutes the principle is broadly laid down, that it is murder in a lieutenant, having the commission of martial authority, to hang or otherwise execute any man, in time of peace, by colour of martial law.

Nor could the crown, except by receiving aid of the power of parliament, as in this statute provided, having failed to make out a case of public crime (*i. e.* desertion), have been entitled to convert it, from the tendency or effect of the evidence, exhibited in the course of a criminal proceeding, into a civil injury, so as to derive a direct reparation for such *injury*, or more properly speaking, the *excusable absence* of the party, through sickness, by making such party restore or return the public money, previously received for services, which he eventually was unable to perform.—These provisions of the statute, it may be observed, act not in any shape in derogation of the power of the crown over the offence comprehended by the act; but leaves it in all its original strength, so that the offence be brought within the province of its authority during the term of actual service. There is no collision but an extension of jurisdiction over this peculiar crime; by rendering it an offence at law.

The 7th of *Henry* the *Seventh*, confirms the last-mentioned statute of *Henry* the *Sixth*, and takes away the benefit of clergy from those offending under it; which is further ratified, in all its provisions against desertion, by the 3d of *Henry* the *Eighth*, and the 2d and 3d of *Edward* the *Sixth* *.

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* A later act, the 5th of *Elizabeth*, c. 5, makes desertion a felony, but not

If any other evidence, than is afforded by the mere view of these statutes, were wanting to shew, that the legislature intended not to interfere with the high prerogative of the crown, in matters properly and purely military—it is exhibited in the 4th and 5th of *Philip* and *Mary*, c. 3, which declares the cognizance of all the offences, described in the acts above referred to, to be by the justices of peace, through the medium of a jury, unless the offence shall be committed in time of actual service, in which event the lord-lieutenant, or any other chieftain, during the existence of his commission, shall have cognizance of the same.

When the legislative power has been interposed, at any of the times or occasions above referred to, it has been with a declared intention, as explained, to assist the royal prerogative, in certain branches of imperfect power, and not to abridge or curtail any portion of its pre-existing authority.

In all matters of *immediate* legislation for the government of the national armies, it has been shewn, or attempted to be shewn, that the crown has had, from the earliest times, and through the whole of the interval described, a sole and unparticipated authority; and that whenever it has been necessary to call in the plenary power of parliament, in regulations of a military complexion, it has been in collateral or incidental matters only—either referring to the general condition of men previous to their actually becoming soldiers, or when they had in fact escaped from such temporary condition by a separation from the army, of their own act; or by giving an extension to the jurisdiction over military offences, where the prerogative, by reason of its limitation in circumstance, would appear to fall short of its object.

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without benefit of clergy. As this does not expressly repeal the earlier statutes, relating to this offence, they may still be considered to remain in force; though they are now, from the operation of the annual mutiny acts, never resorted to.

The sovereign, at this juncture, was the source or fountain, whence the law was immediately derived to the military state, in all its relations and dependencies, bounded only, as it appears, by his single will and discretion. From this, the arbitrary and variable nature of the law itself, as well as from the fluctuating condition of the subjects to whom it related; it could not be supposed to have either the perfection of shape, or the quality of consistency or permanency, distinguishable in the provisions of general enactment, for the observance of the community at large. Still it is apparent, that no very ordinary care was shewn to make it suitable to its ends, by the practice of consulting, on especial occasions, the advice of those who were best informed in the business of war, and in the science of legislation.

Nor was the construction of military ordinances a work of very easy accomplishment; as they were to be rendered applicable, in almost every instance, to a new state of things; on *some* occasions, to the exigencies of domestic or civil strife; at *others*, to a purely foreign warfare; and at a third, to a mixed sort of hostility, arising out of the peculiar relation of our kings, in their continental possessions. Every one of these different circumstances demanded an attention of its own to the temporary ordinances to be framed: and which also in a great measure must have depended on the peculiar policy of the reigning prince. As these ordinances were the suggestions of the mere will of the sovereign, it may be imagined, that they differed in many particulars from one another.

It would be superfluous to go into any nice examination of the ancient rules and ordinances, from time to time framed, since they have fallen utterly into disuse; but as occasional reference may be made to them, when they may serve in any way to throw a light on later regulations, appearing to be

founded on military customs or usages, a summary notice of them may not be altogether unnecessary.

There exists not any digest of the rules and ordinances of war, proclaimed and published by different princes, or their lieutenants, for the government of their armies; but several compilations have been treasured up, in an indigested shape, in the cabinets of the curious, which may suffice to explain their general nature and tendency.

Distinct from the law of the land, which binds the whole community, these rules and ordinances have relation only to the military state, whom they especially profess to regard. They are expressly made for the regulation of the conduct of men, composing the military community, considered in their different relations, as members of that particular association. The conduct, therefore, which they respect, is not general or indiscriminate, but military conduct merely; except it be such, from inherent depravity or evil in itself, as would be obnoxious in any and every society.

It is the province of morality to point out men's general or particular duties, in every of their relations: but of law, in respect of crimes, more particularly, to mark and define the breach of such duties, whether they be positive or negative, and to award to them suitable and correspondent punishment. In this way the law military, as declared by these rules and ordinances, would usually seem to proceed—acting however, in some cases, like the civil law, by occasionally assuming the place of morality, in declaring the moral reason or principle on which it proceeds, as in the preamble to the war statutes, for so they are denominated, of *Henry* the *Fifth*, which commences as follows:

" The clemency of the great Creator disposes those under " him to be modest, peaceable, and chaste; nevertheless, " because unbridled avarice, the enemy of peace, daily

" generates so many new causes for disturbance and litiga-
" tion, that unless its efforts are repressed by the force of
" justice, and the sense and intricacy of its questions re-
" solved, all Christian rules for our army would be destroyed,
" and that common good, for which we live and reign, ex-
" tinguished. Therefore law and constitutions are ordained,
" that noxious appetites may be confined under the rule of
" justice, by which mankind are informed how to live ho-
" nestly, without injuring each other, rendering to every one
" their right. And that our army, as well in peace as war,
" may be led in the proper path, and the said common
" good preserved entire; and also, on the other part, that
" the constable and mareschal of our said army may judge
" and determine the more prudently in the causes daily
" brought before them; We have, with the advice of our
" peers, lords, and nobles, made certain constitutions, pro-
" mulgating the same in our army by public proclamation,
" enacting, that all and every one of the captains in our said
" army, shall have these our said constitutions in writing,
" that our publication may be considered as a sufficient
" warning, and that all those concerned may not pretend
" ignorance of the said constitutions."

And so again in the " Statutes and Ordinances for the Warre" of the 35th of *Henry* the *Eighth*.

" His Majesty minding due order to be observed and kept
" amonges all sortes of men of his Highnes most royall and
" puissant army, as well captaynes, soldiers, as others, in
" such wise as apperteyneth both towardes God and the
" world, hath devised and commanded to be sett fourth cer-
" tayne ordinances and statutes for the warre, as hereafter
" ensueth," &c. &c.

As the preservation of due subordination in the military ranks is the first vital principle, which the ordinances have in view, so it is their primary care to impress the necessity of

implicit obedience to the source of all military authority, the king, and his immediate lieutenant or general; communicating, in circulation, a due portion of its virtue to the very extremity of the military body; by making disobedience a capital offence. Thus in the statutes of *Richard* the *Second* it is first ordained.—" That all manner of persons shall be " obedient to our lord the king, to his constable and mare-" schall, under penalty of every thing they can forfeit in " body and goods," but more especially and significantly expressed, in the first article of the ordinances of *Henry* the *Eighth*, viz.

" That all manner of men of the same army of what " nation, state, or condition soever they bee, bee obeisant to " the sayde lieutenant-general, upon payne of drawing, hang-" ing, and quartering, or other punishment at the discretion " of the lieutenant."

After declaring the obedience due to the king, and his representative, and enforcing it under the gravest possible sanction; the ordinances enjoin the conduct, which is to be observed by those, who are the objects of military law, in their general relations, and of the duties arising out of them, as to God and man.

All the military constitutions shew a peculiar regard to the fulfilment of religious duties, the most sure foundation of human legislation, by inflicting the most exemplary punishment on the breach or violation of them. The ordinances of *Richard* the *Second* enjoin,

" That none be so hardy to touch the body of our lord, " nor the vessel in which it is contained, under the pain of " being drawn, hanged, and beheaded *."

It is followed by an article, not less penal, touching offences against the church, or those engaged in its service.

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* This offence is made capital, also by the ordinances of *Henry* the *Fifth*, *Henry* the *Eighth*, and others.

"That none be so hardy as to rob and pillage the church, "nor to destroy any man belonging to the holy church, re-"ligious or otherwise, nor any woman, nor to take them pri-"soners, if not bearing arms; nor to force any woman, on "pain of being hanged."

"Priests daily serving God, and ministering to him at the "altar," say the ordinances of *Henry* the *Fifth*, "shall al-"ways enjoy their privileges. Any one laying violent hands "on the said priests, or slaying them, shall be capitally "punished."

And it pursues—"Which punishment it is our will, shall "be extended to the ravishers of women, whensoever they "are found: further directing, that no one have the temerity "to touch any religious men or veiled or religious women "whatsoever, they wearing without fraud the habit of their "order *; nor shall any one dare to make them prisoners, "they not appearing in arms, nor openly nor privately mak-"ing war, under penalty of imprisonment, their body there "to remain during will."

Besides the crime of rape, and the capture of non-combatants, it was also considered as a species of sacrilege, and inscribed among the offences against "the holy church," "to take of any place, person, town, or country, having "safe-guard of the king's lieutenant, any manner of goods "and victuals, without the agreement and will of the ward-"ens of the same places or persons upon payne to be im-"prisoned, and the offender's *life* at the said lieutenant's "will."

In this class of offences were reckoned *blasphemy*, *profane swearing*, and neglect of *divine worship*. The punishment attached to the latter was discretional; but to the first, whether committed by officer or soldier, was annexed the

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* The church was in the habit of granting colourable protection, and therefore the introduction of the words "without *fraud*."

severe penalty of having the tongue, the offending member, bored through with a red hot iron*.

Offences against the law of nations, and more especially the higher description of them, such as the violation of safe-conduct, the maltreatment of merchants or others coming with victuals or articles of necessity or consumption to the armies, are summarily punished by almost every ordinance that is preserved to us.

In an article of the ordinances of *Henry* the *Fifth* and *Henry* the *Eighth*, it is ordained " that none dare to break " or violate in any manner, any safe conduct, granted by the " king or his constable, under pain of hanging, drawing, and " confiscation of hæreditements and goods†.

To protect the sacredness of *passports* or *safe-conducts*, it is declared a capital offence, in any one but the king, or his lieutenant, or his constable, if he had commission to that effect, who should presume to grant them ‡.

Making inroads into the country, adjacent to the camp, without command of the king or his lieutenant, or setting fire to houses and buildings, may be ranked under this head: they are both regarded, in the ordinances of *Henry* the *Fifth*, as crimes of the highest nature and punished with death.

Of crimes, immediately affecting the *person* of the *king*, the more ancient military statutes do not treat. But in the ordinances of the *Earl* of *Northumberland*, and indeed of the *Earl* of *Essex*, the parliamentary general in the time of *Charles* the *First*, it is laid down, " If any one speak irreverently against the king's majesty and authority §, or shall

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* See the ordinances of the *Earl* of *Northumberland* temp. *Charles* the *First*, and those of *James* the *Second*.

† See the ordinances also of *Richard* the *Second*.

‡ Articles of *Henry* the *Fifth*.

§ Any words used towards the king would not, at common law, be considered more than a high misdemeanor.

presume to offer violence to his majesty's person, he shall be punished as a traitor." The same ordinances award death to those "that use any words to the dishonour of the lieutenant-general, the king's representative."

These also make it treason, "to have or keep intelligence "with the enemy, or to deliver up, but in a case of extreme "necessity, any place of strength, magazine, victuals, &c." and declare it to be a capital offence, "to furnish money, "victuals, or any commodities to the enemy."

As the last-mentioned offences are so directly and notoriously against the common allegiance of the subject towards the sovereign, it might have been thought superfluous to include them in the ordinances of old; or possibly they were left, from the heinousness of the crime, to the cognizance of a higher and more regular tribunal. This latter supposition seems the more probable from the following article in the regulations of *Henry* the *Seventh* *.

"That ne manner of person, ne persons whatsoever they "bee, make no quarrell to any man: ne sease, ne vex, ne "trouble any man by body or goods, for any offence, or by "color of any offence, heretofore doon or commytted against "the royal majestie of the king, our sayde soveraigne lord, "without his auctoritie, and especial commandement, given "unto him or theym, that so doon in that behalfe, on payne "of death."

But as this regulation was published in the time of civil war, it might have been dictated by the policy or temper of the times; when it might not have been deemed prudent to punish men summarily for the side they had taken in the contest, or, when the minds of individuals, partaking one way or other of

* These ordinances were made, on the eve of the battle of *Stoke*. After the event of that battle, the king ordered the trial of certain persons, for holding intelligence with the enemy, by commissioners appointed for that purpose. *Rapin.*

the prevailing hostility, might have been thought unequal to the administration of impartial justice.

Desertion, in the general and broad sense of the term in which it is now understood, is a crime not specifically included in any of the early ordinances; though "flying from the king's colours" or temporary "absences from quarters or the host," are mentioned as serious offences, and as such most severely punished. Is the omission of the specification of this high offence against the king's prerogative, owing to the flagrant quality of the offence itself, of which all men must be supposed conscious; or to the provision made for the trial and punishment of it by the common and statute law of the realm?

Flying from the colours, or flinging away arms, or ammunition, have ever been taken as enormous military offences— and by the ordinances of the *Earl* of *Northumberland* were punished with death.

"*Retreating* before *handy blows*" as quaintly described by the same ordinances, is followed by banishment from the camp in the case of an officer, and of *decimation* in private soldiers, or punishment at the discretion of the general; "the rest to serve as pioneers or scavengers, till a worthy "exploit take off the blot."

Against a class of offences, having near affinity with those just named, affecting the king's government, namely, touching the administration of justice, or the public interests, these ordinances abundantly provide; such as the misfeasance of officers in trust, the obstruction of the proceedings of courts of justice, or the execution of the law martial, and the embezzlement and destruction of arms or the public stores. There are many distinct and descriptive articles in every existing code of regulations, that range themselves respectively under one or other of these several heads.

Under the title of *public musters* it is precisely laid down

in what way they shall be made, and the means are described with accuracy for the prevention of frauds or abuses.

In the war statutes of *Henry* the *Fifth*, it is ordained, "that the captains shall shew only their own soldiers, with "whom they have agreed for the expedition, and no other, "under pain of *perpetual reprobation*, and the loss of their "wages for the expedition."

False musters have, at all times, been held a very grave crime; and by the ordinances of *Henry* the *Eighth*, are punished, on a repetition of the offence, with *death*.

Any persons lending themselves to be fraudulently mustered, are subjected to be imprisoned at the king's will.

The laws and ordinances of the *Earl* of *Northumberland* have the following clauses on the same subject:—

"No muster-master shall wittingly let any passe in the "muster, but such as are really of the troop or company "presented, on pain of death."

In respect to the muster-roll, it is directed—

"Which said list or roll shall be subscribed, not only by "the captain, his lieutenant and cornet, or ensign, but also by "the serjeants and corporals respectively, who shall declare "upon their oaths, that the troopers and soldiers enrolled "in the said list are real and actual troopers and soldiers of "the respective troops and companies, and whosoever "shall be convicted of falsehood, in any of the premises, "shall be punished with death." And again,

"No man shall presume to present himself to muster, or "be enrolled in the muster-rolls by a counterfeit name or "surname, or place of birth, upon pain of death*.

"No captaine of a troope shall present in the musters "any but real troopers, such as are bound by their oath

* Ordinances of the *Earl of Northumberland*.

" and pay, to follow the troope upon pain of death, with-
" out mercy: and if any towns or countremen, victualler,
" freebooter, enterloper or soldier whatsoever, of any other
" troope or company, shall present himself or his horse, in
" the muster, to mislead the muster-master, to defraud his
" majesty, and to betray the service, the same shall be
" punished with death."

Arms *lent,* for the purpose of being exhibited at the muster, were subject to forfeiture.

It would be beyond the present design, to take notice of the various provisions for obtaining true and bonâ fide muster-rolls, or for the prevention of other abuses.

In the ordinances of *Henry* the *Eighth* is mentioned another species of offence, of a kindred nature—the withholding of pay due to soldiers by their superior officers. In these it is ordained,

" That every captayne, petty captayne, and all other
" havinge under them retinue of any souldeor or souldeors,
" at the king's wages, shall pay to their retinue of souldeor
" or souldeors, the wages rateably, as is allowed unto them
" by the kinge our sovereigne lord, or the treasurer of his
" warres, without diminishing or defalkeing any part thereof,
" during the tyme that they shall receive wages for them:
" this payment to bee made to the same retinues by their
" captayne, or petty captaynes, of souldeor or souldeors,
" within six days next; and immediately after the sayd
" captaynes or petty captaynes or others shall have re-
" ceived their wages of the king, or of the treasurer of
" the warres, or of their lords and masters, upon the pen-
" altie, that he which offendeth therein shall forfayte to the
" kinge all his goods and chattels, and his bodie to prison
" at the king's pleasure, except that hee bee reasonablie
" letted in that behalfe, whereof he shall within the same

" six days duly certifie the said treasurer of the warres; " and also it shall be lawfull for every man, fynding him " grieved in this behalf, to complayne him unto the trea- " surer of the warres, whereas he shall finde his sufficient " remedy in this case."

There is a particular division in those and other ordinances, embracing the offences against public justice—under the title of " Braving the Court of Justice," or, " of " *resisting* Justice;" in which it is ordained, that

" No man shall presume to use any braveing, or " menacing words, signs or gestures, while the court of " justice is sitting, upon pain of death."

Also—" If any man bee adjudged to the death, by the " king's majestie's marshal, or any other judge ordinarie, or " any other officer lawfull, that no man presume or attempt, " by any means, colour, or pretence, to resist the execution " of the judgment, upon payne that if the condemnate bee " a traytor, hee that is the chief resistant shall have like " payne of death as the condemned was adjudged unto; " and all the resistants, adherents, fautors, and abettors, to " bee beheaded, and if it bee any other crime or offence, " capitall than treason, that then the resistour in such case " shall suffer like paynes and punishments as the principal " adjudged should have sustayned and suffered, and all " other the resistours, adherents, fautors, and ayders, to " bee punished at the king's pleasure."

And as to breaches of arrest—

" That every man shall obey the king's sarjantes, porters " of places, and all other officers havinge authoritie to ar- " rest, assigned by the king's majestie or the marshall, or " by anie other officers of authoritie. And that no man " presume to break their arrests, upon payne of ymprysonment, and his bodie to be at the king's pleasure, his

"grace's lieutenant or lieutenants; and if the prisoner dis-"obeyinge the sayd arrest mayme anie of the sayd officers, "then he so offendinge, to suffer payne of death, and if hee "grievously wound or hurt anie of them, then to be impri-"soned and punished at the king's pleasure."

There is an extraordinary article in the laws and ordinances of the *Earl* of *Northumberland*, which it may not be impertinent in this place to notice; it is to the following effect:—

"No man shall resist, draw, lift, or offer to draw his "weapon against an officer, correcting him orderly for his "offence, upon pain of death." This is included under the head of "resisting against *correction*."

It would appear from this article, that officers were in the habit at this time of chastising soldiers, in a summary way, with their own hand—or from the tenour of the clause they must otherwise be regarded in the light of mere executive ministers, which is hardly credible.

Embezzlement or destruction of ammunition is declared a capital offence by the last-mentioned ordinances.

It is directed also in the same ordinances,—

That "No town or countryman shall presume to buy or "take to pawn, an horse, or arms or furniture of tents or "hutts, of any soldier, upon pain of forfeiting the double "value thereof, and to be punished at discretion; and the sol-"dier giving them to pawn shall suffer a severe punishment."

"If a trooper shall *spoil* his horse *wittingly*, of purpose "to be rid of the service, he shall lose his horse and remain "in the camp for a *pioneer*:" and so, "if he *lose* his horse "or hackney, or a footman any part of his arms, by negli-"gence or lewdness, by dice or cards, he shall remain as a "pioneer or scavenger till they be furnished with as good "as were lost, at their own charge."

But the greatest anxiety is to be observed in all the ancient ordinances, for the preservation of the public peace, and of due order and discipline throughout the king's armies; and to this end the most minute provisions are framed and published for the prevention of every act having the slightest tendency to a breach of the peace or disturbance of the camp.

These offences, considered at common law as misdemeanors only, are every where regarded in the military statutes and ordinances, as offences of great magnitude, and are punished accordingly.

An article in the ordinances of *Henry* the *Fifth*, treating of "Disturbances and public Cries," proceeds—

"Moreover it is our will, that no one of what condition, "nature, degree, or dignity soever, shall dare to make any "clamour or disturbance, by which we or our army may "any ways be disturbed, &c. under pain that the beginner "shall be arrested, and with his horse or horses put in "custody of the constable or marshall, to be punished with-"out favour, until he shall have duly satisfied the said con-"stable or marshall for his offence."

Such satisfaction could not be very trivial, for the circumstance of the reward, offered to the informer, who should discover the offence, is fixed at a *hundred shillings* of *Tours*.

In a succeeding article,—

"Also, if any one shall proclaim his own name, or that "of his lord and master, by which proclamation, a gathering "or assembling of the people shall be made, to the disturb-"ance of the army, any one so offending, and convicted "thereof, shall be publicly hanged: if any one shall be "found to have in any manner begun the clamour, called "'Havock', without our special license; he shall be

"punished with death; and his followers, with arrest of body "and goods *."

In respect to the last-mentioned offence, the ordinances of *Richard* the *Second*, award "that they who shall begin the "cry of 'Havock', to be beheaded, and 'their bodies after-" 'wards hanged up by the arms.'"

To obviate the common causes of discontent, the war statutes of *Henry* the *Eighth* enjoin,—"That none debate, "strive, or contend for arms, or prisoners, lodgings, or any "other cause, malice or quarrell, or other thing, whereby "any riot, contention, or debate may grow in the hoste, upon "payne of imprisonment and further punition at the king's "pleasure." Also, "That no man give reproach † to none "other, because of the country that he is of; that is to say, "be he *Frenchman*, *Englishman*, or *Welchman*, *Irishman*, "or any other country, whencesoever he may be of; nor "that no man say no villanie to others for any cause, through "the which villanie sayings, may fall out sudden manslaugh-"ter, reysing of people, dissention, debate, or division in the "hoste, upon peyne, all such barritours be imprisoned for as "longe as it shall please the kinge."

"That nae man presume to take or withdraw any servant "from any other, that which is in covenant with him for the "voyage, as well soldier as man of arms, archer, groom, or "page, after tyme he is known or challenged by his master, "upon peyne his bodye to be imprisoned to the time he

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* Other cries are denounced, but not under so heavy a penalty. "Making any shoutinge or blowinge of hornes, or whistlinge, or great noise after the watch is set," rendered the party offending, in either of the ways described, liable to imprisonment and other punishment. *War Statutes* of *Henry* the *Fifth*.

† In the charter of *Richard* the *First*, "Any one, who shall reproach, abuse, or curse his companion, shall for every time he is convicted thereof, give him so many ounces of silver."

"hath agreed with the partye complainant, after the order of "the courte."

By the ordinances of the *Earl* of *Northumberland*—

"Any soldier or servant, departing from his captain or "master, though he serve still in the same army, is subjected "to capital punishment."

And again, "That no man make debate, strife, or conten- "tion, for any hatred or malice for tyme past, ne for tyme "to come, whereby any man be slayne, upon payne of him "or them, that be causes or partners of the murder, to be "hanged therefore."

In the charter of *Richard* the *First*, "Any one convicted "by lawful witnesses of having drawn his knife to strike "another, or who shall have drawn blood of him, to lose his "hand."

For the more effectual suppression of deadly feuds on board ship, between men embarked on a common expedition it was ordained by the same charter,

"That he who kills a man on shipboard, shall be bound "to the dead man, and thrown into the sea: if the man is "killed on shore, the slayer shall be bound to the dead body, "and buried with it."

This would infer that some jealousy existed, even in these times, between the marine and military branches of the service.

Acts of mutiny, or a tendency thereto, are visited by the same statutes, with extreme severity; and first as to "unlawful assemblies."

"That nae man make any unlawful assemblies of the king's "people, or make any bands, conspiracies, routs, or con- "venticles, or reyse or engender murmeyrers, or grudgings "against the king or any other person of his hoste, whereby "might ensue murder, division, dissention, sedition, stirringe, "or commocyon of the people in the hoste;"—nor "by

" reysing a banner or pennon of any armes, image, or other " token, or by any other means, assemble people to with- " draw them out of the hoste, to goe to any other place, " without the king's authoritie, upon payne to be hanged, " drawn, and quartered, and that noe man follow ne ensue any " such person out of the hoste, upon payne to bee hanged, " and as well the reysers of the said banner or pennon, and " *assemblair* of people, as the followers, to be reputed tray- " tors, and to forfeit unto the kinge all their landes, goodes, " and chattailes foresaid." This latter ordinance was directed against those "that make themselves captaines to " withdraw men from the host."

There is an article in the statutes of *Richard* the *Second;* to the same purport with the above.

The uttering of words "tending to sedition and uproar or mutiny," is made punishable with death, by the ordinances of the *Earl* of *Northumberland;* and the same punishment is declared against those, who, having heard such words, do not acquaint their commanders therewith.

To guard against disorder in the king's armies, various ordinances prescribed, that constant "ward and watch" should be had, as a mean of precaution and prevention, as exemplified in the annexed article of the statutes of *Henry* the *Fifth.*

"Whereas disturbances frequently happen in our army, " as well by day as night, which by daily and diligent watches, " and proper guards, are prevented; wherefore we ordain " that our mareschell shall appoint a daily guard, portioned to " the number of armed men, of which our army shall consist; " and every captain shall in turn assist, in performing the " said watches and guards. Nor shall any captain either of " horse or foot, being, as is premised, duly warned and or- " dered for guard, dare to be deficient in the number of men " of armes, or archers, or to quit the said guard or watch in

" any manner, until the limited time, without the special " license of him, by whom the said guard was appointed, " under pain of *décapitation*. We moreover ordain, that all " the captains of our army shall keep a sufficient watch in " their quarters, as well by night as by day, whether on an " expedition, or beseiging castles, forts, or towns, under pe- " nalty of arrest of their bodies, to be severely punished at " our will."

" A sentinel found asleep or drunk, or forsaking his place, " without he be drawn off, shall die for the offence without " mercy *."

Several articles are contained in the old and later ordinances with a view to the apportionment and adjustment of the rights of captors in their prisoners, and of the shares or thirds to the immediate commanders of such captors. As the price of ransom was at these times the principal inducement to serve, where service was in itself optional, it would be most necessary to remove a cause of continual dissention, by defining, under very clear rules, the opposed interests of parties, in matters of prize. We accordingly perceive the most minute regulations on this head in the war statutes of *Henry* the *Fifth*, and *Henry* the *Eighth*, and even in later seasons; when it might be supposed that the practice of ransom had ceased.

In the spirit of the same policy, directed only in a different course, various provisions were almost universally introduced in the war ordinances, for the suppression of that description of vice and immorality in the host, which had a peculiar bearing towards the creation of feuds and quarrels; and more especially against gaining, chambering, and drunkenness.

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* Ordinances of the *Earl* of *Northumberland*.

If any one should be found playing at "dice, cards, tables, closhe, hands out, or any other game," without license of the king or his lieutenant (as one of the ordinances declares), "he is to be committed for the first offence, to the ward of "the marshall for eight days, and to forfeit the stake he was "playing for; one half to go to the provost of the marshall, "the other to the informer." For the *second* offence "to "be imprisoned one month, and lose a month's wages; one "half of which to go to the king, the other to the informer." For the *third* offence, "the party to be imprisoned during "the king's pleasure, and to suffer such other punishment as "the king shall direct."

Against *bordell*-keeping in the hoste, it was commanded, in one of the articles of *Henry* the *Eighth*,

"That noe man bring with him any woman over the sea, "upon payne of forfeiture of their goods to the marshall, "and their bodies to be imprisoned at the king's pleasure. "And that noe man hold any woman within his lodging be- "yond sea upon payne of imprisonment, and loss of a "month's wages."

The same penalty was awarded by the garrison regulations of *Henry* the *Fifth*, with this additional clause, "Nor "shall he (the party offending) be released from prison, "until he shall have given reasonable security" (to be fixed by his captain) "that he shall live and converse well and "honestly for the future."

The unfortunate sharer in the offence was yet more harshly dealt with; it being ordained, "That if any common woman presume to come within the king's hoste, or nigh the same by the space of three miles, if any so be taken, to be brent (burnt) on the right cheek at the *first*." If taken *afterwards*, "to be put in the ward of the marshall, there to remain in prison as long as shall please the marshall, and to

have farther punition, as by him, shall be thought convenient."

Any common woman remaining in any fort or garrison, after being admonished to quit, was doomed by the garrison regulations of *Henry* the *Fifth* to have her left arm *fractured;* surely a most cruel and barbarous mode of punishment, having no proportion, nor discernible affinity to the crime.

By the parliamentary ordinances, in the time of *Charles* the *First*, the punishment was further aggravated; for it is therein ordained,

"If any whore shall be found following the army, if they "be *married* women, and run away from their husbands, "they shall be put to death *without mercy;* and if they "be *unmarried*, they shall be first marked by the hang-"man, and thereafter by him scourged out of the army."

Soldiers have been always represented as peculiar favourites of the fair—but had the camp in these days such very fascinating attractions, that all these strange severities were needful for deterring the frailer order of the sex from venturing within its purlieus? If the ordinances do not sufficiently demonstrate this fact, they at least shew the opinion of the leaders of our armies, of the danger to be apprehended from the communion or contact of the sexes in the time of war.

Drunkenness is not set forth as a substantive military crime in any of the more ancient ordinances; not because it was an unheard-of offence, for it was as common, as we read, of old, as in our own times; but, perhaps, it was not thought an object of punishment, unless it shewed itself in some offensive act.

It is otherwise regarded by the framers of modern military constitutions, wherein it is holden as a most pernicious offence, being, as it undoubtedly is, a direct promoter of

strife and quarrel, and the parent of numberless consequential evils, most dangerous to the peace, the comfort, and safety of the military community. This immoral indulgence in an officer is punished by the article of the *Earl* of *Northumberland*, with "loss of place," and in a soldier with such penalties as a "court-martial shall think fit."

The ordinances under consideration comprehend not only crimes against the king and state, the peace, security, and well-being of the army, but also all offences against individuals, which are the ordinary objects of punishment by the statute or common law, wheresoever they are in force. As such law is of a municipal character, having a limited or a local jurisdiction, it would have often failed in effect, if its provisions had not been extended and enforced by military ordinances, operating on the same body of delinquency.

It is impossible that any well ordered society can be held together, for an instant, without the exertion of some authority repressing wrongs against the persons or rights of the individuals composing it: thence arises the necessity of military regulations, to supply the place of civil institutions in a foreign territory, or at perturbed periods, when the ordinary laws have lost their authoritative voice and sway. Thus by the military, as well as civil law, murder, rape, robberies, larcenies, and other minor offences, are similarly denounced and punished.

In the 7th article of the statute of *Richard* the *Second*, there is this summary ordinance, which is aided in its operation by the offer of a large reward to the informer under it—

"That no one be so hardy to rob or pillage another of "money, victuals, provisions, forage, or any other thing, "on pain of losing his head; nor shall any one take any "victuals, merchandise, or any other thing whatsoever,

"brought for the refreshment of the army, under the same "penalty; and any one who shall give the names of such "robbers and pillagers to the constable or marshall, shall "have twenty nobles for his labour."

Theft, above the value of a shilling, is numbered among the capital offences, in the ordinances of the *Earl* of *Northumberland*.

There are many other offences specified in these and other ordinances, which it would be tedious to pursue, and unprofitable to enumerate, since they have become a dead letter: enough has been observed on their policy, nature, and effect.

It may be added, and it would seem all that is necessary to be added, to the foregoing account of their contents, that beyond the penal provisions contained in them, they comprise articles having relation to the conduct of persons commorant with the armies, though unclothed with a military dress, and create a jurisdiction for the determination of intervenient differences, of civil cognizance, between such persons and soldiers. To this effect we have a clause in the statutes of *Henry* the *Fifth*.

"Merchants, either travelling with the army or buying or "selling in our markets, shall obey our constable and mar- "shall, and even the clerk of the market, as ourselves. "Also all contracts, crimes, and suits, shall be heard and "finally determined in our court, by the judgment of our "constable and mareschall; or in the absence of our con- "stable, in the presence of our mareschall, if *one* or both "of the contractors, delinquents, or suitors, are belonging to "our army, whether soldiers or merchants."

Other ordinances communicate a similar jurisdiction over the military body, in the like controversies; which alone was wanting to complete throughout the camp, the general scheme of distributive justice.

In taking leave of the ancient ordinances, a remark or two offer themselves, and as they will be short, may the more easily be excused, on their general features or character.

They would appear, from what has been observed of them, to have been providently and carefully made for rendering the army an organized and orderly body, well conditioned in itself, and an instrument, in proper hands, for the promotion of the legitimate ends of war against the enemy, with the least possible excess. To effect these salutary purposes, it is always necessary that the military law should be not less strict in enactment, than uniform in its execution. Yet, however, it may be doubted, whether the penalties, described in the ordinances in question, do not in many instances overstep the bounds of moderation; the measure by which all punishment, in order that it be respected, should be meted out. The infliction of death, and that in many cruel forms, the last resort of humane and civilized legislation, is here the first, and ever present resource.

Drawing, hanging, quartering, and beheading, is awarded without any discrimination, against offences of dissimilar quality, and of the most contrasted dye.

Were the unbridled tempers of the soldiery so strong as not to be restrained, but by so straight and severe a course; or were the times so barbarous, that man's invention could not devise suitable and proportionate punishments for the variety of occurrent offences, so as to be driven to the necessity of using one species of sanction for almost every crime? Though the *ultimum supplicium* is most lavishly, most indiscriminately, and most inconsiderately used, there is yet, if not a greater distinction, a greater variation of punishment, adjudged by the ancient ordinances, than by those of modern date. Some of them are of a most ferocious and

sanguinary description; such as the dismemberment, maiming, or fracturing of limbs, boring of the tongue with a red-hot iron, and burning or branding the cheek, and cutting off the left ear. The last-mentioned punishment was inflicted chiefly on boys or pages, followers of the camp, and for the most trivial and childish faults.

If I have more particularly confined my observations to those parts of the ordinances, which relate to the graver military offences, and the punishments apportioned to them, it must not be presumed, on that account, that they were deficient in articles, looking to the repression and correction of misdemeanors. To have noticed these, one by one, would have far exceeded the limits of a single chapter. It will be enough to say, that the ordinances in general contained a most minute enumeration and classification of military crimes, however secondary or subordinate, and a clear denunciation, so far as they admitted of precision and specification, of their correspondent punishments. Among the latter, *fines* and *forfeitures* appear to have been very common; imposed by several articles on many slight transgressions, whether committed by private soldiers, or their immediate superiors or officers. The profits of the earl marshall depended in a great measure on this productive source.

Incarceration or *imprisonment* was a most ordinary punishment; and sometimes rendered more strict, by the prescription of a meagre diet of bread and water, during the term of the prisoner's confinement. At others, it was aggravated by the addition of bonds or chains.

Shaving of the head, and *degradation* from the honourable rank of soldiers, to the meaner occupation of *pioneers* and *scavengers*, was a punishment adapted to petty pilferings, and dastardly and cowardly behaviour in the face of the army.

Running the *gantelope*, was another penal infliction, of a

highly painful nature; hardly ever adjudged, except in extraordinary cases, disgraceful or discreditable to the character of the corps to which the offender belonged.

Corporal punishments were rare, and leniently used, though they were inflicted summarily, and sometimes without trial, as has been remarked in a preceding place.

Riding the *wooden horse* *, and the whirligig †, which may be included perhaps under this head, was not an unfrequent

* There is an instance of a punishment of this sort, which took place on two private soldiers in the time of *Charles* the *First*, before the Royal Exchange. It was ordered by the house of commons, which at that time took cognizance of military offences. It was for an abuse of military authority towards certain citizens. In addition to riding the wooden horse for an hour, they were condemned to run the *gantelope* on another day at the same place, through a particular regiment named.

Grose, in his Military Antiquities, gives the following description of the punishment of riding the horse, and of the manner of executing it:

" Riding the wooden horse was a punishment formerly much in use, in different services. The wooden horse was formed of planks nailed together, so as to form a sharp ridge or angle, about eight or nine feet long. This ridge represented the back of the horse; it was supported by four posts or legs, about six or seven feet long, placed on a stand made moveable by trucks; to complete the resemblance, a head and tail were added. When a soldier or soldiers were sentenced by a court-martial, or ordered by the commanding officer of the corps, to ride this horse, for both were practised, they were placed on the back with their hands tied behind them, and frequently, to increase the punishment, had muskets tied to their legs, to prevent, as it was jocularly said, their horse from kicking them off; this punishment was chiefly inflicted on the infantry, who were supposed to be unused to ride. At length, riding the wooden horse having been found to injure the men materially, and sometimes to rupture them, it was left off. The remains of a wooden horse was standing on the parade, at *Portsmouth*, about the year 1760." 2d vol. p. 106.

† This species of discipline is described by the same author in his peculiar way.

" The *whirligig* was a kind of circular wooden cage, which turned on a pivot, and when set in motion, whirled round with such an amazing velocity, that the delinquent became extremely sick, and commonly emptied his or her body through every aperture."

discipline. The first was confined to soldiers, and the second to sutlers and followers, practising deceits, or breeding disturbances in the camp.

Whipping, as now practised, being a refinement, as it were, on the former modes of corporal chastisement, increasing the rigour of punishment by prolonging the duration of it, if not the intensity of pain, would not seem to have been introduced until a later era; and then, it may be supposed, reluctantly and of necessity, from the change which had taken place in the condition of persons, of whom our armies were subsequently composed.

The military ranks, in remoter periods, were filled, as it has been shewn, by men of substance, and generally of landed property: who had ability to make atonement for slighter offences by pecuniary mulcts; a sort of composition conformable to our early usages. The subjection of men of this description, to frequent corporal chastisements, would not therefore have been politic; and certainly not necessary, while any other remedy remained untried. The interest of certain officers, in the levyable fines of soldiers, must have favoured and co-operated, with the policy which thus directed itself to the purse, rather than the person of the offender. When the pursuit of the camp was afterwards preferred as a profession, and a means of livelihood, not as a common, indispensable, and occasional duty on a certain class of citizens, it then became incumbent on those, who had to legislate for the military community, to advert to this most material change, in shaping their regulations and ordinances to the varied constitution of their armies; when it must have been almost intuitously perceived, that a pecuniary expiation of crimes, proceeding as it must, in such a case, out of the pocket of the public, could not be countenanced in the military code, and some expedient more cheap, and from altered circumstances, perhaps more efficacious,

must be substituted in its stead. Hence a species of punishment is resorted to, which, if not exceptionable in itself, is, from the frequency of its use, and the strange extent of its application, not less discreditable, as it is supposed by many well-directed minds, to the spirit of the military law, than the general character of our armies.

But passing from the contemplation of rules and usages, somewhat obsolete, and in part forgotten, on which, perhaps, I have already dwelt too long, I would hasten to the consideration of the present conformation and constitution of the military state, and, then, of those living laws, which have grown out of contingent circumstances, and have been adapted, in a vigilant and careful policy, to its uses and its wants. And first of the military institution, as obtaining at the day.

CHAPTER IV.

Of the Military State at and from the date of the Revolution.

THE military state was to a certain degree established, but not absolutely fixed, at the period of the Restoration. The parliament, by a most solemn recognition of the military prerogative, acknowledged, at that era, the vast and almost unbounded authorities, precedently exercised by the crown, in respect to the raising and government of the national armies. This, however, like every other formal declaration of the legislature, could not be considered so conclusive as to preclude it, at all events, from reconsidering, or modifying its original act. Human legislation, acting chiefly on the experience of what is past, frames its laws in a state of imperfect knowledge as to their future effect, and is not wild enough to exclude progressive wisdom through the inlet of growing experience. Hence the law in its progress, accumulating to itself the wisdom of successive ages, is not inaptly described the perfection of human reason. Miserable indeed would it be, if it were bounden, by a tenaciousness of its authority, or presumption of infallibility, to perpetuate its errors.

However large the military power of the crown might be understood to be, from the ample recognition of parliament, it could not be considered as wholly unrestricted. The excessive use of this authority, subsequently to the Restoration, by the princes of the *Stuart* line, might, without this explanation, have countenanced a different conclusion. But the same limitation, attaching to the general branches

of the royal prerogative, attaches also to this, prescribing its extent, by the circle of its beneficial use, and declaring it to terminate at the point, when the exercise of the power would be inconvenient or injurious to the subject*.

The two princes, immediately alluded to, like other members of the same royal and illustrious house, had an impetuous and overweening fondness for the high prerogative of the crown, and indulged this unhappy passion in its utmost latitude; no wonder then, if it be seen to transport them, on certain occasions, beyond the confines of prudence and the law.

Charles the *Second*, on his immediate restoration, discovered an inclination to remove the uneasy state of the popular feeling by the abolition of military tenures; certainly a very wise measure, and calculated in a particular manner to disarm the nation of its fears, arising out of the pre-existing military authority of the crown; and it had been well for his own peace, and the comfort of his people, if he had improved on that early disposition. But the inclination was as inconstant as it was sudden and unexpected. The king soon relapsed from grace, which was so happily hailed, and which so well became him at the commencement of his reign, into the rigorous enforcement of the military authority resident in his hands; the unguarded exercise of which had been so fatal to his unfortunate predecessor. Not sufficiently instructed by the sad example of that monarch, or governed by the prudent advice of a most able counsellor†, the king adopted the common error of his house, in supposing that the safety of the throne depended on the fulness of its power, rather than the affection of its people.

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* *Finch*—Lib. 1, 84, 85. So *Bracton*. "Nihil potest rex, nisi quid de jure potest."

† Lord *Clarendon*.

This unhappy mistake made him alive to every apparent infringement on or question of the royal prerogative, and occasioned so anxious an interest, visible in all his acts, to the preservation of its actual or supposed authority, as possessed his subjects with an opinion that he was more solicitous for his exclusive privileges, than for the public benefit, which they were especially designed to serve.

With the predilection for the high military prerogative, partaking, as it does, of a more absolute quality than any other branch of the regal power, the king superadded a distrust, certainly a most unfortunate one, of the fidelity and patience of his people. Whether there were at first any substantial reasons or not for a doubt of this sort, it might be feared, that acting on such an impression, and from the exercise of an obnoxious power, he would soon convert, what might only be a suspicion, into reality.

The king had scarcely placed himself in his regal chair, when he surrounded himself, of his own mere will, with a standing guard, more perhaps as a badge of state than a measure of personal precaution; and which he afterwards increased, in an evil hour, on one pretence or other, to five thousand men, who might be considered, from their constitution, as a regular and permanent force.

The number of this infant standing army would not, of itself, have spread any great alarm among the people, if they had not beheld in the very nature of the institution a principle of extension to any possible latitude, circumscribed only by the discretion of its originator. In this comparatively moderate military force, coupled with its various uses, for it was convertible to the common exigencies of the public service, in the defence of domestic and foreign garrisons, as well as the protection of the palace, the Commons thought that they perceived the germ of innumerable armies, which might thereafter branch out, if not season-

ably pruned, with unrestrained luxuriance; and thence arose a jealousy, which exhibited itself in endless opposition to every proposed accession to the number of this species of force.

It was not denied, even in the most humorous moment, that the crown was armed with authority, at its single discretion, to summon to its standard such fitting force as might from time to time be requisite for the immediate defence of the realm, or for the wider purposes of aggression; but it was strenuously contended, that it was an abuse of such authority, and contrary to the spirit of the constitution, to maintain a force in arms, without regard to the subsisting relation of the country with reference to its foreign policy. The objection was not against the power itself, but the occasional or rather the supposed unseasonable exercise of it; and this was considerably fortified by a knowledge, that the king maintained almost an open understanding with the French Court* for the supply of a stipulated military succour, for maintaining the kingly authority, if it should be assailed, against the resistance of the subject.

Whatever reason the sovereign might have had for distrusting the people, it was evident that the jealousy of the latter was not excited by any light or fantastical cause. It is a circumstance therefore of little surprise, that the House of Commons, speaking the people's wishes and their fears, should seriously and warmly remonstrate on the introduction of a permanent military body, raised without any apparent necessity, and therefore on a doubtful authority, and liable to be converted to a most suspicious use. The influence of the popular organ, at this season, was almost at its height, and might be supposed to give a considerable weight to its remonstrance. On the other hand, the recent re-establish-

* *Hume*, vol. 9, page 18.

ment of the royal house, the unsettled state of the royal revenue, and the personal necessities of the sovereign, must also have lent an incidental recommendation to the angry complaints of the subject, regularly and orderly expressed through the mouth of his representatives. But these considerations appear to have been disregarded; or to have been reckoned of secondary consequence, when opposed to a darling project, which seemed to have wholly engrossed the royal mind, and to have rendered it alike impervious to the voice of reason and remonstrance.

The king, instead of discovering any caution as to the exercise of his military prerogative, seeing the extreme odium with which it was regarded, persevered in the prodigal use of it, treating the public suspicion as a groundless and ill-conceived notion; and being confirmed in his high sense of the royal authority, by a council, which drew to itself the denomination or nick-name of the *cabal*, who either owned or pretended to own the same sentiment with their sovereign, of the power of the crown, condescended not either to temporize with the testy spirit of the season, or to abate in the employment of a calumniated authority. In the crisis of popular ferment he delivered a speech from the throne, tending to provoke rather than sooth the ruffled temper of his people; in which he observed,—" That rumour had been spread, as if the new levied army had been intended to control law and property, but he regarded that jealousy as so frivolous, that he was resolved to *augment* his *forces* next spring, and did not doubt that they would consider the necessity of them in their supplies*."

This is not the sole instance of the king's contempt of public feeling; which is outraged, without scruple or reserve. The national force is exhausted in warlike pursuits,

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* *Hume*, vol. 9, page 70.

particularly obnoxious to the wishes of the people, in favour of the views of *France*, a national rival, and in opposition to the interests of the *United States*, tried and valuable friends. Large supplies are demanded and partially granted for specific warlike purposes, which are expended on foreign objects. Amounts also are voted and accepted for the pay and discharge of the troops, which are applied to opposite ends. The military force is kept up by palpable evasions, on its first footing; and a design is at last avowed of retaining it, in *defiance* of parliamentary representations, until events of uncertain accomplishment shall happen.

The king shews the same unwillingness to forego any other part of the military prerogative, with that exercised by him over, what we should now call, the *regular* army.

He resists all attempts on the part of the Commons to put the militia, a favoured force, into a more efficient state, and resents, as it were, their very interference with the constitution of this popular branch of the army. He withholds the royal assent from the Militia Bill, the first negative he had ever put on a public bill, which proposed to call out the whole of that constitutional body for the purpose of exercise, in certain stated proportions at a time, for the space of six weeks in every year.

The king is not satisfied in giving an open negative to the measure, but discovers to the parliament (an imprudent discovery at the time!) the spleen which he felt at the supposed infringement of the prerogative, and the determination he had formed against the slightest diminution of it, by telling them, in so many words, " that he would not part even for *half an hour*, with the power of the sword*;" declaring, in the high estimation in which he held this weapon, its value, and its influence; and thus exciting and increasing the fears,

* *Hume*, vol. 9, page 202.

which, to the disquiet of the nation, had previously been entertained of its power.

The rashness and impolicy of the king naturally irritated the public mind, then very ill at rest, and involved it in a direct struggle with the prerogative, in its largest exercise, as now insisted on by the crown.

The Commons, founded in their purpose, and fully confident in their strength, pass from words and strife to more effectual opposition; increasing, as they proceed, in violence of tone, and energy of action. Finding that the represented grievance of the standing guard and the prayer that it should be disbanded, as burdensome to the nation, are equally unheeded, they come to a bold and unequivocal resolution, that this species of force being without the sanction and countenance of parliament is not only illegal in itself, but dangerous to the liberty of the subject. The courage and the confidence of the Commons is manifested in the vote, which is passed, at a time when the usual number of guards was kept on foot, and even during the period when a considerable force was embodied and encamped at *Blackheath*, under the command of a foreign marshal*, and many subordinate officers of the Catholic religion. Pursuing the spirit in which this vote is conceived, the Commons refuse or qualify, according to their existing temper, the supplies of money which are urged and demanded by the king; though to be employed, sometimes, on projects approved and recommended by themselves. At other times when they are induced to any grant, it is given with a scanty and a grudging hand, and charged with such conditions, as are derogatory to the honour of the king, and discreditable to the character of his servants. The money voted for public services is transferred, in undisguised affront, to the chamber of the *city* of

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* *Schomberg.*

London, as a place of greater safety, in preference to the king's exchequer.

The dignity, honour, and the common honesty of the king is suspected; nay, even his sworn fidelity is questioned, and this, not in doubt or whispering, in a secret corner, but in public speeches, uttered in the face and hearing of parliament. The motion for every new levy is stigmatized, as having in view the disturbance and destruction of the common liberty; and when it is attempted to be justified by the minister, and sometimes by the king, as being governed by a fairer and more legitimate object, the Commons hesitate to credit the justification, until it be shewn in its effect, and until the troops required be actually engaged in the specific manner suggested. Thus the raising or retention of every fresh body of troops becomes a matter of petty daily dealing, a retail bargain, rather than a great transaction, negotiated on large considerations and for national interests. The contracting parties lose sight of public utility, in stipulating for their separate private ends and advantages; and in the narrow spirit of trade, push their respective pretensions, without any scrupulous regard to the interests with which such pretensions are at variance. The Commons, at length, presuming on the principle, which they had advanced from the beginning, that the crown cannot of itself, or without their concurrence, keep up a military force within the realm, in time of peace, proceed step by step, from one assumption to another, until they touch, with an unhallowed hand, the most sacred, and hitherto unapproached branches of the royal prerogative. They infringe on the sole and undoubted right of the Crown to make peace or war; by desiring or *dictating*, as it may be more properly called, adverting to accompanying circumstances, with whom the king, in his wisdom, should form alliances, or with whom he should maintain the contrary relations; requesting, in the alternation of one or the other dispo-

sition, that he should dismiss his own pre-inclinations, and in a deference, almost unheard of, should adopt and prefer others in their stead. Thus the king is addressed to enter into an offensive and defensive league with the *Dutch*, and to forego the pre-existing treaties, and to wage a most vigorous war with *France*.

It is not necessary to discuss on which side the true policy of the country would be better consulted, in a matter which depended entirely on the absolute will and discretion of one of the parties to the question.

The Commons, it must be confessed, had great appearance of reason for their alarm, at the bodies retained in arms by the Crown; increased by the suspicion, also not without cause, that they might, at some unhappy moment, be used to the subversion of the liberty of the people. Still their alarm, had it been greater, or more reasonable even than it was, ought not to have carried them so far as it appears to have transported them. The power, with which they were dissatisfied, was at least acknowledged in its principle; and the prudence of exerting it, in any given circumstances, could alone be called in question. This too, like the exercise of every power of discretional use, would be a matter of nice determination in every instance; depending not on general rules, but on particular grounds, and often on personal views, or jealousies attaching to them; at all times delicate, at some impolitic, or dangerous to be assigned. A power of such essence and subtlety demanded the most cautious and tender treatment, not a rude and rough handling, ill suited to its texture.

It seemed not to have occurred to the Commons, that they were not standing, *supra vias antiquas*, on ancient and established rights, but were urging pretensions altogether novel, or in opposition to former customs, which could not be touched or abolished, without affecting or destroying rights

of a personal or official character, that had grown up and flourished along with them.

A peculiar and felicitous address might, perchance, have lured the coveted object from its first possessor, but it could not be wrested from its place, on any reasonable supposition, by boldness or by violence. Yet the milder and more promising expedient was rejected—and reliance placed on its possession, not so much for the merit or virtue of the demand, as the strength and force of the demandant.

The persevering and ungracious urgency of the Commons was of itself enough to exasperate the feelings and excite the disgust of the king—if it had not related to a subject, of near and peculiar interest, and if it had not been attended by circumstances of additional aggravation.

But the surrender of a confirmed and important branch of the prerogative was not only asked in an authoritative manner, and most repulsive tone, but the immediate exercise of it was impeded by numberless obstacles, often interposed without consideration, and always without reserve; while its future exercise was deprecated through the condemnation of its present use: so that the proposed cession, if it had been made, would have worn the appearance of a tacit admission of the jealousy on which it professed to be founded. At the instant, too, when this large submission is required, every kindred ramification of the royal prerogative is intemperately invaded; the king is called upon to retract his foreign engagements—to change his policy—to forego or to commence hostilities—to raise or to disband his armies, not on the suggestion of his own wisdom—or even the collective wisdom of the two houses of parliament, but under the single control and dictation of the Commons; who promise, in the event of the king's compliance, in employing his armies in the way which they point out, that he should be plentifully supplied with money and with means; or if *not*,

that then his troops should be forthwith disbanded and dispersed. In substance, if not in letter, he is desired to give up, without reservation, one most essential branch of the executive authority, and place the rest of the military power of the Crown in temporary commission, and at the disposal of a particular portion of the legislature, to be returned or retained, of course, as it should comport with the will of those that held it.

Had the disposition of *Charles* the *Second* been more proverbially careless, and thoughtless, than it is generally represented, there was sufficient to rouse it from a state of listlessness or inactivity, in the extraordinary assumptions of the Commons; even had he not regarded, in a sort of constitutional or family jealousy, the power of the sword, as the most valuable part of his prerogative. In the proportion that this power was prized, the invasion of it was more keenly felt—and every attempt to assail it, was in consequence resented with fresh and increasing bitterness; until such an acerbity of temper was engendered by alternate remonstrance and resistance, in incessant reiteration, that compromise became at first difficult, and ultimately impracticable, and there seemed not any course remaining for the adjustment of pretensions, so opposite in themselves, and so obstinate in their prosecution, but continued conflict, or the silencing of one or other of the claims, or the claimants, by an act of positive power. This was at last achieved, by a desperate but effectual measure of the crown, in the dissolution of the authority of the Commons (which was not re-organized) for the remainder of the reign.

Any thing short of this bold proceeding, would probably have plunged the country into all the horrors of intestine war, yet recent in remembrance, and too deeply impressed on the memory to be easily effaced.

The dispute from the commencement, was involved, as it

appears, in difficulties, and was rendered more perplexing in its progress, by the manner in which it was conducted.

It originated not in a question of plain and simple principle, but of a complicate and mingled policy; not of general right, but particular expediency. There could be no doubt of the authority of the Crown, at this period, to call out the military force of the country at its discretion, subject here, as in all other discretional acts of the Executive, to the proper constitutional checks. This was from the beginning ceded, and consisted not, it may be thought, with the proposition of the Commons, that such force could not be drawn out, without the sanction or concurrence of parliament. Now the authority could not be discretional, if it were made to depend on previous sanction; but must in that event have been authoritative, not indeed in the crown, but in parliament, who assumed to dictate the time or occasion for the exercise of the power; too wild a proposition, seemingly, to be maintained in argument, though relied on in effect.

The new doctrine of the Commons proceeded to an extent, which was not compatible with the then subsisting power of the Crown. If it directed itself against any particular use of such power, and called it constitutionally into question, and rested itself there, the interference undoubtedly would have been within its competency, and under the proper bounds—but it took a more comprehensive range, and declared, that the retention of a military force, without the consent of parliament, dangerous and illegal; which would appear to involve not the partial, but the general exercise of the prerogative, making every use of it obnoxious, without the parliamentary sanction. But preceding customs and usages, for a series of ages, were against a position so broad and so unqualified. The Crown had at all times exercised, as it has been shewn, an almost unbounded military prerogative—calling forth and keeping up the numbers of the troops,

which it deemed, at particular seasons, to be necessary, on its own mere will; governed by surrounding circumstances, and the state of its own or the national resources. In all else, it seems to have been free and unshackled.

This would not preclude the parliament from interposing, according to its ancient and undoubted privilege, its advice or its remonstrance on any undue or extravagant use of such power. The parliament could not, however, lawfully oppose the actual exercise of it, without first altering or modifying the power itself.

The resolution of the Commons might possibly have had such alteration in its intention, and the safety of the state might have demanded it; but this could only be effected by some prospective legislative act, not by a parliamentary declaration, in contradiction of all preceding legislative knowledge or practice.

It was not reasonable to imagine, that the king would consent to wave an essential prerogative on a mere requisition; and the Commons unfortunately chose to stand on their newly found authority, not on the reason or solidity of their pretension, or they would have represented to the Crown, as might be fitting,—the changes that had taken place in the condition of the different estates of the kingdom—the revolutions in the customs, habits, and practices of neighbouring nations, to which it was necessary, that our own establishments and usages should in some degree conform, so as to keep pace and state with those, with whom we had to commune and to mix—that the power, therefore, antecedently exercised by the crown, was from circumstances inexpedient or dangerous, and that a modification of it, to the varied condition of things, had become consequently indispensable. They might have described, in colours strong enough to appal and incline a mind less indolent than that which the prince possessed, from the use of a nice discre-

tional power, which could not thereafter be exercised without difficulty and probable danger, since the principle of it had began to be doubted, and the practice to be invidious: capable however of modification, by no striking or singular process, into a certain and unenvied prerogative. Or if they wished to arraign any single instance of the application of power, or had been more disposed to have recourse to a particular than a general argument, they might have explained the ground on which they specifically disapproved of the occasion or the manner of using it. No—such representations they disdain to urge; and appear throughout to have been averse from assigning any reason for their demand; except as it arose out of their will, or their apprehensions; neither of which causes could have consoled the *pride*, or gratified the *feelings* of the illustrious sovereign, whom they respected —when *both* were to be conciliated, ere a cheerful sacrifice of a long-exercised prerogative could have been rationally expected.

They who are most inclined to decry the obstinacy of the king, in adhering to power, which he found to be invidious to his people, must grant that he had some excuse for his pertinacity, in the bold and uncourteous manner in which he was called upon to lay it down, and in the still more exceptionable course by which he was desired to govern himself in the use of an authority, arising out of and most intimately connected with the same prerogative, which was not then and has not since been questioned.

The general attempt at interference with the kingly power might also have dissuaded, through the dread of creating a precedent, any particular surrender or condescension on the part of the crown, lest it should stir up the popular spirit, already too highly excited, and not, as it should seem, by any remarkable cause.

The *number* of the standing guard, which exceeded not

five thousand men, could not surely have been considered as a sufficient instrument for subduing the liberties of the nation: and it may be added, from the practice of preceding reigns, that the maintenance of such a force was neither new nor unusual, nor did any apparent inclination of the king to increase it, justify the extraordinary jealousy and strenuous exertions of the Commons at the time, to put down the existing force. Even after the Crown had liberated itself, by the extreme act explained, of the interposition of the Commons, and the restraint of their advice, it aimed not to augment the number of the guards, to any terrific amount, but on the contrary reduced them, as is apparent from a muster taken at the end of the reign, to four thousand men*.

If it be supposed that the previous remonstrance of the Commons had any influence on the subsequent conduct of the king, and that the diminution of the troops was in deference to the public opinion, the same supposition would infer the causelessness of the suspicion of the abuse of a power, which was tempered, in its use, by so much attention to the popular feeling. If it were self-limited in its exertion by the personal moderation of the prince, there was the less ground for the particular and very watchful jealousy of the Commons.

It has been usual to consider the military prerogative of the Crown too plenary at this peculiar juncture, and not, under circumstances, to be continued, without hazarding the public liberties; and I would not be understood to dissent

* There is some difference in historical statements as to this fact.—*Hume* says, without mentioning any authority—that *Charles*—"at the end of his reign, augmented this number (having before spoken of five thousand men) to near eight thousand;" but *Rapin*, apparently on more circumstantial information, states, that the king mustered his army a few months previous to his death, and that it then amounted to four thousand men only.

(in making the foregoing observations) from the general sentiment, when I intended only to express a very natural concern, at the peculiarly importunate manner in which this attempt was made to introduce a proposed amendment in the constitution; and which appears to have failed more from injudicious conduct, than from any inexcusable rashness in design. Nor is it less to be lamented, that a question of this vital importance should have been mooted and abruptly dismissed without receiving a decision, or even a satisfactory discussion, which might have ascertained the merits of contradictory claims, and have offered the claimants an opportunity for a calm and sober consideration of their respective pretensions, after they should have been defined, and thus have cleared the way for the final adjustment of the subsisting differences, either by the renunciation of an inconvenient and unreasonable power, on the one hand, or by an abatement in expectation on the other. Instead of this advance to so desirable a conclusion, the question was stated in its full bearing on either side, and moved and stirred enough to agitate the feelings of all, and then interrupted by an act, which closed the door both against discussion and conciliation, and left the dispute to rage without control, or the hope of termination, for the remainder of the reign.

James the *Second* succeeded to the throne of his brother, together with the dispute, descending with it, and with a spirit and disposition manifested on many previous occasions, to insist on the extreme of the prerogative, rather than relax in any of the high notions entertained of it by its predecessor. The king, however, was compelled, from the necessity of his affairs, and from the want of a settled revenue, to assemble a parliament, from which in a common season, he might have expected the same opposition which

had been experienced by the preceding princes of his royal house, and which had rendered that assembly an object, not of favour, but of apprehension.

A reflection on the latter events of the reign, that had just concluded*, which had tended to subdue and humble the country party, that had opposed the prerogative of the crown; and the early occurrences of the existing reign, more particularly the *rebellion* of *Monmouth*, must have freed the royal mind from all fear of restraint or control, if it had conceived such, at the commencement of its rule. But the king, from the moment of his succession, appears to have thought himself secure from any opposition to his will, and to have acted with so much independence, as to evince that he regarded himself, if not the sole, at least the paramount authority in the state. He continued, of his mere will, the customs and excise, which had lapsed by the demise of the crown; being a most direct interference with the privileges of the House of Commons, with whom all supplies should originate, and shewing an unconcealed contempt of the subsisting law, and of the public opinion, by going openly to mass, then an unlawful meeting. In his very first speech to parliament, he threw out a most significant hint, that unless that assembly should shew a ready compliance with his demands, he would find some means for supplying them, by the power within his own hands; concluding, "that the best way to engage him (the king) "to meet the parliament *often*, was always to *use* him "*well!*"

Notwithstanding these proceedings, which were calculated to inflame the jealousy generally entertained of the prerogative, and to lead to the renewal of the dispute, which had commenced, but had not terminated with the preceding

* Consequent on the Rye-house plot.

reign, the parliament was averse from continuing the old, or entering on any new difference with the king, and carried its deference to the Crown so far, though fully sensible of the arbitrary principles, and the bigotrous notions of the present wearer of it, as to vote a large revenue to the king, *during life*; thus rendering him in a great degree exempt from the check of the popular estate. This measure, declaring more the submission than the confidence of the parliament, seems to have been viewed in that light by the king—and, instead of promoting accommodation, to have induced nothing but subsequent encroachments.

On the fortunate suppression of *Monmouth's* rebellion, which had the effect, if not by its direct calamities, by the eventual bloody and unparalleled scenes in which it closed, of silencing for a while every subject of public complaint; of impressing the necessity of implicit obedience; and of strengthening, to which such events have a natural tendency, the arm of the reigning sovereign; the king, enwrapped in the contemplation and the enjoyment of his fresh and unbounded power, lost all respect for the co-estates, and wantonly provoked discussions, from which the other branches of the legislature had willingly retired. With an imprudence almost without example, even in the extraordinary excesses of this singular prince, he revives, with additional circumstances of aggravation, the most exceptionable parts of the dispute about the military prerogative—condemns with the most severe animadversions, the national militia, as unsuited to its ends*; and wishes to replace it with a force, more

* The defective state of the militia, whatever it might have been at this day, was in some degree ascribable to the neglect with which that body of troops had been treated in the reign of this prince, and of his predecessor; under a jealousy, perhaps, of the restraint which had been imposed on the crown, at the restoration, in respect to the mode enjoined for calling out, or embodying this species of force—But although it was affected to be held

tractable in its nature, and more congenial to his views. For this purpose he calls on the House of Commons to furnish him with a supply for keeping up the levies which he had raised for quelling the late rebellion, and to shew how little he reckoned on resistance, or how slightly he was disposed to value it; he ventured to inform the parliament, that he had taken a great number of Catholic Officers into his pay—and had dispensed, with a view of admitting their services, with the tests, which the law enjoined to public officers of every denomination; that he was determined to retain such officers, at all events; for having had their services in time of danger, he would not suffer them, as he observed, to be disgraced, nor himself to be exposed to the want of their assistance, in the event of another rebellion†; an allusion not less indelicate than unwise.

Never could a more objectionable application have been made, nor enforced in a more incautious manner. While it purported to ask a boon, it disdained to receive a refusal; and so far from affecting a conciliatory aspect, it assumed a forbidding and contemptuous sneer; it not only outraged all decorum, but every sense and semblance of feeling. Yet the fear of the military prerogative, so much and so warmly opposed in the preceding years, was but a secondary apprehension now, and was nearly overlooked in the danger, which seemed to spring from another quarter, threatening religion and the law with one common ruin. The dreaded consequence of a standing army was doubtful, and at all events remote—but the dispensation of the provisions of the law,

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in a disparaging light by this and the preceding sovereign, it was more respectfully viewed and treated by *France* in the self-same times, and was a main obstacle to her projects on the liberties of this country. It has been cultivated and appreciated, as it ought, in later periods, and more especially in the reign of his present majesty.

† *Hume*, 9 vol. page 409, et infra.

was an inordinate, and certain evil. As such provisions were the only security for the national religion, the invasion of them consequently raised a more lively and proportional alarm. The *dispensing power*, thus openly asserted and exercised by the crown, if not opposed, in so glaring an instance, might in time, and by the force of precedent, do away all tests and securities for the due discharge of offices, by persons lawfully eligible to them, and so weaken the security of the law itself, by arming the sovereign with an authority, and at his sole discretion, to annihilate its force, whenever it might be found obnoxious or inconvenient in its use. How far the moderation or prudence of the prince might be expected to put a limit on such discretion, might be collected from the first extravagant use of it, which stopped not to consult the desires or quiet the fears of the subject, but combated the one and excited the other in an unnecessary and an unprecedented degree.

If the king had over-rated his pretensions, in order to allow a latitude for compromise, one would not have been so much surprised at his stating them so highly; but from the first to the last he appears not to have shewn the least inclination to relax in his original purpose. He was determined, contrary to the known and declared wishes of his people, to have a standing army—and, as if that was not sufficiently unpopular, he was resolved that it should be commanded by a description of officers, who would make such an institution doubly dangerous; alarming equally to the civil liberties, and to the established religion of the country, and, eventually, to every thing dear and sacred in the constitution.

They who are disposed to hold the demeanor of the Commons in the late reign, as harsh and disrespectful towards the Crown, must consider such conduct to have been amply retaliated on the Commons by the acts of the reigning sovereign. Arbitrary and grievous as these acts were, they were

suffered to pass, in the temper of the times, without any pointed opposition, or without any other sign of discontent, than was to be gathered from a few hasty animadversions, cast on these violent and imprudent measures, in the course of the debates in the house of Commons; and these invectives were directed almost wholly against the assumption of the dispensing power.

The Commons give a general though certainly a reluctant assurance, that they will furnish a supply, for the maintenance of the military force; which falls short, it is true, in the event, of the unreasonable expectations of the Crown. It is a pledge, however, for the support of a measure, which must have been extremely ungrateful to their feelings.

An address is moved and presented about the same time to the king, couched in the most submissive language, against the exercise of the dispensing power; which is scornfully received, and openly resented. Yet in despite of the quality of the measure of the court, and of the inattention to the public wishes and representations on the part of the crown, the Commons proceed to make good their promise in providing for the exigencies of the army, by creating and assigning funds for its payment, of a more fixed and certain nature, than were usually allotted to this species of grant*.

This yielding compliance of the Commons, must be regarded not as a retraction of the former opinion of that body, of the dangerous nature of the military prerogative, as affecting the absolute and uncontrolled origination of the national force; but a temporary submission to circumstances, which it wouldnot be easy to countervail, nor prudent at the season to oppose.

The arbitrary sentiments avowed by the king, at this the opening of his reign, accompanied by the offensive acts,

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* *Rapin*.

which they suggested, might be supposed to induce a crisis, at no very distant day, when compliance might be more happily denied by the Commons, and when refusal would become more justifiable, as well as effectual.

The number of summary punishments, which had been just inflicted, at the close of the rebellion—and the military strength, which that event had deposited, and still continued in the hands of the king, could not have been without their influence, also, on the counsels and acts of the popular assembly. Besides, the views of the king were at this time supported by a victorious soldiery, numbering fifteen or twenty thousand men; stationed contiguously to the capital, and exhibited to the public notice by frequent and ostentatious reviews. The prepared and present force could not have been easily overlooked, any more than the possible employment of it, in the introduction of the severity of martial law, if the will or policy of the king should have proceeded to that extremity, and of which the Commons might not have held any very unreasonable apprehension from the recent recourse to such a measure, if not by the instruction, by the sufferance of the crown, in its almost unbounded application*. These considerations might account for more complacency, than the Commons were inclined to shew, in respect to the military demands: and perhaps this complacency, under the extraordinary circumstances explained, is the best practical gloss that could be offered, on the reasonableness of the public fears on the subject of the high military prerogative of the crown, and the incompatibility

* The military executions which took place at the close of *Monmouth's* rebellion, in the west of *England*, under the command of the execrable *Kirke*, are here alluded to, which, for their cruel and sanguinary character, would seem to be without a parallel, if they were not unfortunately kept in countenance by the civil enormities perpetrated at the same æra, under the colour of judicial proceedings, by the bloody and inhuman *Jefferies*.

of it, in its extent, with the principles of a limited government.

The House of Lords exceeded the Commons in their resistance of these extravagant measures, but like them, confined their opposition principally to the *dispensing* power.

The bench of bishops, who are not wont to take the lead in disputes involving the royal prerogative, stood prominently foremost in calling such power into question. The interests of religion, which were perceived to be in imminent danger, prevailed over every private and personal consideration. The convertibility of the power, if tamely rendered up, to temporal as well as spiritual objects, evidenced in the ease and universality of its application, by familiar instances, as set forth in the speeches of these venerable prelates, put every description of the nobles in adverse array against it; who discovered so determined a posture to oppose the extension of the assumption, that discountenanced any attempt of the king, to appease or soften the irritation of his hereditary counsellors, by the like means which had been successfully used with the more stubborn, and, generally, the more intractable branch of the legislature. But as this opposition was more violent, and subsequent, in point of date, to that of the Commons, it might have been understood by the king, as having been offered, in anticipation and defiance of such resentment, and therefore have induced him to abstain from an attempt, which would have proved, in all probability, unavailing.

The king, at all times relying on the royal authority, and possessing the most extravagant notions of its extent, seems to have been so much exasperated at the demeanor of the houses, as to lose all temper, and to resolve on ridding himself, before he had experienced any essential opposition, of the unwelcome restraint of parliament. Without waiting for the perfection of the pecuniary grants of the Commons, that

assembly is suddenly prorogued, and dissolved at leisure, never to be recalled thereafter.

By the act thus hastily resolved upon, and fatally executed, the king had no other resource than the power inherent in himself, which was henceforward to be exerted without any check, and with a disposition to use it in all its fulness. The military prerogative must have presented itself as the chief mean of sustaining a power, so objectionable in principle, and so odious in its exercise. But even this mean, so obviously necessary, was strangely and unaccountably neglected.

It would be useless and equally unprofitable to follow this unfortunate and infatuated prince, through all the inroads which he successively made on the constitution. It will be sufficient to remark,—that the king having violated and defeated the law—having invaded almost every establishment of the country—having set the laity and the clergy, the aristocracy and the people, at direct variance with the crown—and having virtually dispensed with the organs, which could enact and declare the future constitution, for the protection and government of society, necessarily left his own will, as the sole rule and security for the civil, political, and religious liberties of the nation; and, extraordinary to relate, neglected, in a fancied sense of the sufficiency and sanctity of his power, to cultivate the only instrument, which could give effect to so preposterous a pretence.

The prince, it is true, did not contemplate to rule without a military force; for he was at all times aware of its necessity for the accomplishment of his ends, and, in consequence of such a conviction, he seized every opportunity of increasing its amount. Here his anxiety ended. He did not calculate, it should seem, on any thing more than numbers; the affection or interests of his soldiers being wholly beyond his estimate. Every thing was absorbed in

the vision of the divine right of kings, to which all human inclinations and passions were bounden, as he conceived, to submit. It was enough to create soldiers, when implicit obedience would follow; without reflecting, that soldiers, as a peculiar body of men, would have peculiar rights and privileges, which, however willing they might be to give up their general liberties, they would not be ready to surrender, nor suffer to be infringed without complaint or remonstrance.

The great bulk of the military force was, in its origin, *Protestant*—and from the tests, imposed by the legislature, must always have continued of that religion; if the king had not determined on dispensing with the tests and the consequent penal enactments. This dispensation therefore was the means of introducing into the army a new class of candidates for military honours: who, from the preference shewn by the king, for those of his own religious tenets, had a superior prospect of promotion to their Protestant competitors; so that it operated not only as an invasion of offices hitherto exclusive, but gave a preference in them to interlopers to the prejudice of the original tenants. It would not have been safe to intrude at once such a number of Catholic officers on the army, as to overpower those, of contrary religious tenets, having legal possession of their offices, and claims correspondent with them; nor practicable, if it had been prudent, from the circumscribed finances of the crown, to disband or new-model the army. The introduction of the Catholic Officers must therefore have been slow and gradual, and their influence on the military body, not only secondary, but comparatively insignificant.

In Ireland, where the Catholic religion prevailed, a precaution was not so necessary. There the Protestants were dismissed from the ranks with very little ceremony, to make room for more favoured troops. But an attempt to ingraft any large body of Catholics on the constituted force of

England, was felt to be peculiarly delicate, and consequently not essayed except in a solitary instance; and this with a view of introducing a proportion of Irish recruits into the regiment of the *Duke* of *Berwick*, the natural son of the king; whose personal influence in the corps, seemingly, encouraged the experiment. The attempt was unsuccessful and most unpromising—having been strenuously resisted by the lieutenant-colonel, and several captains of the regiment; who held out in their refusal of the incorporation of these recruits, against the temptation and the threats of power—and at the expense of their several commissions.

The army, which was the only instrument by which the king might hope to effect and perpetuate his absolute and arbitrary purposes, could only be efficacious so long as it should be united and devoted to his interests. But the perversity of the councils, pursued, could not have any other tendency, than to introduce into the army jealousy, distrust, and discord—and to render it, instead of an united body, acting with one sentiment and one will, a divided and distracted organ with no motive or pretence in common.

A community, so divided, must have had employment enough in watching opposed interests, to have ever joined with cordiality in the pursuit of any single design. Besides the larger interests, involved in this policy, very nearly allied before with the general interests of the nation, were now identified with them; and of consequence the more estranged from those of the king. This act alone was wanting to detach the military, equally with the civil and ecclesiastical establishments, from the cause of the Crown. No reasonable alternative remained, but to seek a compromise with the people, or to obviate the necessity of this condescension, to reduce the army, if it were now possible, with all the solid and all the splendid advantages of royalty, to the pleasure and will of the crown.

The king had no talent, and possibly no wish for conciliation—but rather prided himself, as one should think, on a policy, which, in weak hands, must ever be a dangerous weapon,—of seeking to govern the whole by the disunion and division of its parts. This requires at all times a peculiar skill, in the balancing of different interests, so as to keep the mastery of all by neutralizing the strength of each, by a countervailing power. But the faculty of *James* extended not any further than to divide—he had not the more important and more felicitous quality to balance, and to govern. He afforded abundant proofs of his unhappy skill in disuniting his subjects, but not one instance of his succeeding, on such disunion, in reducing them to rule by any wise equipoise of opposite powers: when once separated, they were separated for ever—without the art to control, or the address to reunite their strength.

Failing in his attempt on the military; which would have been scarcely less prejudicial to his affairs, if it had succeeded, than if it had failed; for in either event it would have rendered the army a disorganized and inefficient body, and therefore incapable of any uniform design; the king made another trial of his favoured policy on the Dissenters from the national church, in the hope of uniting the non-conformists in a common interest with the Catholics. If this second experiment had been attended with a more fortunate issue than the first—it would have demanded a larger accession of strength, from some other part, to have made the aggregate numbers, even on any apparent equality, with the Protestants; who exceeded at this juncture, on the most moderate calculation, four times the amount of the Catholics, even in conjunction with every description of non-conformists.

But the previous conduct of the king towards those, whom he now wished to reconcile, had indisposed them to meet his overtures with confidence. They had been recently treated,

even in *Scotland* (where they most prevailed, with so marked an inferiority to the king's Catholic subjects, as induced them to receive the specious offers, tendered to them, with a suspicion,—that they were intended more out of consideration of the latter, than in regard and tenderness for themselves. They declined therefore a boon, which they could not accept without advancing an influence, that was at present too preponderating. Besides the mind naturally recedes from approaches, which if not perceived to be insidious, are nevertheless suspicious.

The arbitrary acts, and more arbitrary declarations of the king, had alienated, by this time, the affections of the great body of the nation so widely from the sovereign, that there was little chance, even if he had possessed a conciliatory spirit, which he unhappily did not, of restoring them to their course. The dispensing power had been so far exerted, as to leave no penal statute unrepealed, which enjoined conformity to the national religion. As a consequence of this ill-judged measure, every office of importance in the state, had been taken from its late Protestant possessor, and placed in Catholic hands. A communion, though declared a statutory treason, was openly kept up with the *See* of *Rome*, promoted by the medium of avowed ambassadors: and in proportion to these endeavours to exalt the profession of the Romish faith, adverse measures were adopted to depress the spirit and the claims of the national church. The first dignitaries of the latter were suspended, degraded, and persecuted. The court of high commission, always reprobated and proscribed by the law, was now revived. The most unpopular prosecutions were instituted and defeated. The endowed foundations in the universities, for the advancement of learning, and for the support of the established clergy, were invaded and insulted by turns. Nor had the people less reason to complain, than the higher and privileged

orders, for they participated with them in religious sufferings, and in all their fears for the subversion of the little that remained of the constitution; and which appeared to them the more alarmingly exposed, from the discontinuance of parliament, the bulwark of their liberties, and the known security against oppression.

No situation could be more uneasy than another, in this deplorable state of things, unless the sovereign's should be conceived to form that exception. The prince could not address himself to any portion of his subjects, but those immediately about his person, to advise and aid him in his difficulties; and if these persons should be honest enough to give him counsel, adapted to the state of his affairs, it must evidently be offered at the certain ruin of their prospects, from the disappointment of the well-known project of the king. Hard indeed would it have been for a prince, who had so warm a zeal for the Romish communion, and so steady an attachment to all who professed it, to surrender up the hopes of both, after such reiterated struggles to sustain them! For these he had committed all the violences, which were decried from one extremity of the kingdom to the other; and which could not now be retracted or redressed, but through the injury, for so it would be considered by the partial eye of the sovereign, of his favoured and devoted friends. It was too much for the magnanimity of a prince, so bigotted as *James*, to render justice at such a price, though it should cost him more to deny it. He chose rather to surround himself with a numerous army, and to menace those, whom he knew not how to pacify.

Whilst the nation brooded over its grievances in discontent, it silently revolved the measure of extrication; and perceiving the arbitrary notions of the prince to be too deeply rooted to be eradicated, it could devise no other mode of re-establishing the purity of the constitution, than through the removal of

the king; and directed its eyes most naturally, for a substitute, to a personage, who owned a religion congenial to that of the national church, and professed principles conformable to the genius and practice of the constitution. An indirect intercourse is maintained with the *Prince* of *Orange*, a Protestant prince, possessing some claims in himself, but more in right of his consort, to the crown of *Great Britain*, for the purpose of putting an end to evils, which had become too galling and too multiplied to be any longer endured with patience.

The king, in this perilous interval, increased by degrees his army to thirty thousand men; and though it was formed for the most part of the same stubborn materials, which characterized the body previously retained by him, he yet placed on it, for he had no other visible resource, his only trust; expecting in return, which former experience, as well as the prevailing public distemper should have taught him to doubt, a reciprocal confidence. This induces a further trial of the disposition of the army, which is now sought to be ascertained through means as little pregnant with legitimate policy, as those which had previously failed. Seeing the ill effects of threat and intimidation, the king betakes himself to condescension, which he knew not how to practise, and which was as little adapted to his own dignity, as to the situation of those whom it was meant to gratify. Converting the soldiery from a pure executive, into a reflecting and deliberative body, he required their approbation of the conduct of the Crown, and solicited in an equivocal sort of grace, their consent to acts, which had been executed without their counsel.

In order to obtain the sentiments of his soldiers, his majesty proposed, instead of addressing them in a common body, to harangue and consult them by separate regiments; a proceeding, which admitted of more delay and debate than was prudent, and which could avail nothing in point of de-

cision, except promoted by a succession of favourable applications. At all events one should have expected that the corps, on which the first public experiment was to be tried, would have been privately sounded as to its disposition to countenance the royal policy. But no precautionary measure of this sort was observed. It might have been supposed that it was impossible to withstand the new and unheard-of courtesy of the crown. It was resolved, therefore, to make the trial without any preparation, and accordingly recourse was had to a corps on the spot, which, in common prudence, must have been selected, under an impression that it would not be less indisposed or insensible than others to the charm of the royal invitation. This corps was the regiment of Litchfield. It was drawn forth accordingly on the parade, and in the presence and hearing of the king, was addressed by the major, in suitable terms, for their approbation of the acts of the crown, in dispensing with the tests and penal statutes, which had been generally repealed, or, if they declined to sanction such measures, they would signify their dissent by grounding their arms. To the unspeakable mortification of the king, the whole regiment, with an exception hardly worth noticing, adopted the latter branch of the alternative. *James* was at first astonished and dismayed by this unexpected event; but at length, recovering from his surprise, he commanded the refractory troops to resume their arms, adding, as it is said, with a sullen and discontented air,—" that in future he would not do them the honour to apply for their approbation *." In this manner did this miserable project commence and end.

The eyes of the prince seem to have been opened, by this last striking occurrence, to the dislike and abhorrence in which his wild and impolitic system was at this time uni-

* *Hume*, vol. 9, page 473.

versally holden. The conviction which now flashed upon the royal mind, produced an instantaneous resolve to retract all measures of irritation, and to substitute a mild and healing policy in their stead. This resolution, acting with the force of a fresh impulse, induced a sudden revocation, almost by a single effort, of the numberless offensive acts which had disfigured the previous portion of his reign. But the interval for repentance had passed, and the season for conciliation had vanished with it. The secret communications which had been maintained, between the *Prince* of *Orange* and the principal leaders of the different parties in the state, during the continued oppressions of the king, had now proceeded so far, as to admit not of retraction. The force, that was considered to be necessary for effecting the change in the government, was actually prepared at this time in *Holland*, and ready to be brought into action at the call of the popular leaders. The king, though advised by *France* of the gathering and nearly-bursting storm, could not be brought to believe the approach of the tempest.

A public declaration of the *Prince* of *Orange*, setting forth a lengthened detail of grievances of the people of *England*, and the remedies proposed to be applied to the cure of them, first shewed to the king the extent of the peril that awaited him; the natural magnitude of which must have been sufficiently appalling, without the knowledge recently impressed upon him, of the disaffection of his subjects, and disinclination of his army. To give effect to his declaration, the *Prince* of *Orange* landed at *Torbay* with an army of fourteen thousand men, and proceeded directly to *Exeter*—whence he circulated generally, and without obstruction, the instrument, declaring the reasons and the object of his landing.

James, hitherto wavering and irresolute, now felt, from the promptitude of his assailants, the necessity of immediate

opposition, and began to prepare himself and his means (alas, how diminished and enfeebled!) for the encounter; but was so embarrassed in his circumstances, and so distracted in his councils, as to be unable to adopt, at this dread conjuncture, any fixed and rational rule of action. While he is ruminating on his difficulties, they increase so thickly around him, as to baffle and overwhelm his courage. His army, which had already condemned his measures, becomes his only, his last refuge. He is obliged of necessity to try once more its fidelity—and the issue of the experiment might have been foreseen. The soldiers, with their commanders and officers, go over in large bodies to the standard of the invited invader of the land. The nobles and gentry, under the influence of the same sentiment, pursue the same conduct: his chosen servants, his distinguished favourites, even the members of the royal house itself desert the royal cause, and join the general revolt. The king is an isolated wanderer in the midst of his people—an alien in the bosom of his family. What remains for one so lost and so abandoned? Perhaps no honourable alternative. This miserable monarch could devise none: but despairing of the kingly office and dignities, always overvalued, he leaves them to fortune or to accident, and seeks his safety in flight. Even for this he is indebted more to the policy of his successor, and to the indifference of his subjects, than to his own contrivance or consistency.

It is superfluous to notice the recorded consequence of this flight, further than it ended in a revolution, which, superseding all the encroachments of the executive, cutting off all unseemly and unhealthy excrescences, and supplying what was supposed to be deficient in the constitution, defined and confirmed the rights and liberties of the whole community, as well as of its several parts—fixing them on a basis,

which has not yet been shaken, and, as it is hoped, immoveable.

The unhappy and unceasing differences, which the full exercise of the military prerogative had occasioned, and which had agitated the public mind for almost a century, were now set at rest. The power of the crown over the national force was placed upon a certain and permanent foundation, so as to preclude future discontent or question. The only fear was, that seeing how invidious the exertion of the military prerogative had been in preceding times, it might now be narrowed too rigorously; and more especially as the high personage, on whom all eyes were fixed, as the best hope of deliverance from the recent tyranny, was supposed to have a more than common affection for military command and sway. But though left at liberty to put any limit, which might be deemed advisable, from the peculiar circumstances of the government, on the high prerogative of the crown, the lords and the convention seem to have used their liberty with singular moderation, but yet with a firmness bordering on obstinacy, perhaps apparent rudeness towards the illustrious personage, who was placed at the head of the national armies. The latter part of the foregoing observation applies more to the mode of enforcing the principle, which the convention had chosen to establish, than the severity of the principle itself.

The power of the Crown over the national army, to the period of the revolution, may be deemed, in practice at least, to have been supreme—though the occasional exercise of such power had been called into doubt. It was high time, therefore, that it should be now settled, as well for the safety of the Crown itself, which had been much embarrassed by the use of a doubtful prerogative, as for the people, who had suffered from the unswayed exertion of a questionable

and dangerous authority. The security to the one and to the other was now afforded by the introduction of a simple declaration, stating shortly, but substantially, in the celebrated declaration of rights;

"That the raising and keeping of a standing army in time of peace, without consent of parliament, is contrary to law."

To which declaration *William* and *Mary* were required to accede.

This declaration, it may be observed, had the force of affirming the law at the time being; and, by implication, asserting what it had been in foregoing seasons; acting in this respect, in condemnation of the practices of the crown in the immediately preceding reigns. No legislative act, since the occurrence of such practices, had altered their quality, so that if illegal now, as they were declared, they must have been so from their origin.

The mere declaration that a *standing army* in time of peace, without consent of parliament, is contrary to law, would scarcely have fulfilled the ends it obviously had in view; if it had not been attended with favouring collateral circumstances. At the date of this declaration, the votes of the supplies were no longer indefinite, but devoted to ascertained and particular objects, from which they could not be lawfully diverted.

This allotment of every branch of revenue and supply, to a given service, without the power of alienation, gave to the parliament, and more particularly to the House of Commons, a commanding jurisdiction over the national expenditure; and a consequent control over the pecuniary provision for the army, which necessarily included the control over the numbers of which it was composed.

Though the public safety was thought to be consulted by the declaration of rights, as affecting the military prerogative

of the crown: it would seem to have been more firmly promoted by the consequences to which it led, and more particularly, by submitting the military provisions for the state, to the same check and restraint, to which the civil expenditure was subjected. From this time the rank and file of the army may be taken to be generally governed by the army estimates of the Commons.

It is not the least extraordinary circumstance in this the first declaration against the legality of standing armies, that it is made at a season, when the necessity of them must have been generally apparent, as a counterpoise against similar establishments, which obtained in almost all the principal states on the continent, and more especially in *France*, at that time governed by a prince, who aspired at universal dominion. It is also remarkable, that from the time of the declaration, standing armies have been constantly on the increase. The objection to them, however, it must be recollected, had been in a great degree removed, by rendering the number of them subject to the consent of parliament; seemingly a slight security in theory, but found in practice and in effect, by the consequences which it superinduced, and which are about to be mentioned, to be commensurate with the object.

Soon after the accession of the *Prince* and *Princess* of *Orange* to the throne, a circumstance occurred, that was not suffered to pass unimproved, which tended to abridge the prerogative of another portion of its power over the military state, and consequently to give increased strength in military affairs, to the potent arm of parliament.

At the very commencement of the reign of *William* and *Mary*, in 1688—9, a mutiny took place, among the troops quartered at Ipswich; who disarmed their officers, seized the regimental chests, and declared for the superseded sovereign. Above five hundred privates of the troops attached to the

royal Scotch and Dumbarton's regiments desert, and proceed towards their homes. The reason of the discontent was the alleged preference shewn by the king towards his Dutch troops; which had led, as it was supposed, to an order to the former to embark for *Holland*, to supply the place of troops imported from that country. This was resented by the Scotch soldiery in the way explained.

A difficulty arose as to the course of proceeding in this extraordinary emergency; some contending that it was a purely military crime; others, which was combated by *Mr. Hampden,* that it was treason by the statute. At length it was resolved by both houses to address his majesty—" desiring him to take effectual care to suppress the soldiers " then in rebellion, and to issue his proclamation to declare " them rebels and traitors," with a view it may be supposed, to bring them within the scope of the statute law respecting such offenders. The king answered, " That he should be ever ready and careful to give such orders, as the Lords and Commons should desire, and that he had already appointed three regiments of dragoons, with orders to stop them, and bring them to their duty; and, if the mutineers would not submit, to fall upon them; and that he would send immediate directions to his attorney-general, to prepare a proclamation according to the desire of both houses in their address."

The mutiny was soon quelled by the prompt measure of the Crown. But the sanction of parliament being afterwards required, on account of the uncertainty existing as to the competency of the acts resorted to for the suppression of the mutiny, the House of Commons eagerly seized the circumstance, and turned it into an occasion of legislating for the military body, by instantly framing and passing through all its stages, a bill against mutiny and desertion.

The act was passed on the 12th of April, 1688—9, to have effect until the 10th of November following. It bears about

it the evident signs of great haste in preparation, but it is sufficiently declaratory and provisory of all that was intended to be operated by it. It assumed not a general superintendance and interference over military offences; for this might have awakened the jealousy of the Crown, but its enactments were directed against the specific crimes of *mutiny* and *desertion*, then in the immediate view of the house. But though it affected not an universal authority in practice, it established it in principle; by laying down positions, as founded in law, which would seem contrary to the supposition, that such general superintendance could reside elsewhere than in parliament. It re-asserted the principle set forth in the declaration of rights—as to the unlawfulness of standing armies, without the consent of parliament, and justified the present necessity for maintaining the troops then in pay, on the ground of their being requisite " for the safety of the kingdom, for the common defence of the Protestant religion, and for reducing of *Ireland*," then in a state of rebellion against the ruling sovereign: next reciting, " that no man can be forejudged of life or limb, or subjected to any kind of punishment by martial law, or in any other manner than by the judgment of his peers, according to the known and established laws of the realm," yet it being necessary for the preservation of discipline in the corps, allowed to be retained; the statute went on to enact, " that every person being mustered and in pay as an officer and soldier, within the time comprehended by the statute, who shall excite, cause, or join, in any mutiny or sedition in the army, shall suffer death or such other punishment, as by a court-martial, shall be inflicted."

The statute then proceeded not to acknowledge any resident power in the crown to appoint courts-martial, but to authorize their majesties, or the general of their army, " by *virtue* of the *act*," to grant commissions to any lieutenant-general, or other officers not under the degree of colonel, to

call and assemble such courts-martial, for punishing such offences as aforesaid.

The remaining clauses of the act regulated the number of the members to compose the courts-martial and the course of proceeding, with other particulars.

From the exercise of the power of legislation over the higher order of offences, and from the assertion of a like right in all, the step to the actual assumption of an authority by the parliament over military offences in general, was short and in the usual course of things. From year to year this legislative power was manifested in successive mutiny acts, each discovering some new accession of influence, until it became universally prevalent. Except for a very short interval, there has not been any interruption to these annual enactments from the revolution to the present time.

The Commons did not suffer the previously acquired power over the national force, in respect to the regulation of its strength, to rest upon the mere letter of the declaration of rights; but as this was more directly and more anxiously sought, than the secondary acquisition, the right of legislating for its government, so it was more cautiously guarded, and more scrupulously enforced. The nation, at this æra, was involved in extensive hostilities abroad and at home. It was not practicable, therefore, to dispense with any part of the standing force, which existed at the revolution; but, on the contrary, it was felt to be necessary from time to time to increase its strength; but every care was taken, consistent with the maintenance of the requisite force, so as not to let it exceed what the exigency of the times or circumstances actually demanded. The armaments, successively equipped, for the suppression of the insurrection in *Ireland*, and for the reduction of the power of *France*, were great almost beyond comparison, and frequent beyond example; yet they were not grudgingly granted by the parliament.—Still a very

minute and watchful attention was shewn, that the number of troops required, at the annual applications of the crown, should be specifically set forth, as well as the pecuniary supply to be allotted to their maintenance. Towards the end of the confederate war against *France*, the Commons voted a regular land force, for the purposes of the year, of eighty-seven thousand four hundred and forty men—and a sea force of forty thousand men; but did not relax in their vigilance, when the necessity for so large an army ceased, at the conclusion of the peace of *Reswick*, of reducing it to the smallest possible number; and in a manner, certainly not the most gracious to the Crown; though consistent enough with the principle, which the Commons were desirous should remain something more than a dead letter on the statute book.

Within a few weeks after the proclamation of peace, the parliament assembled, when his majesty, taking occasion to advert, in the course of his speech from the throne, to the state of foreign politics, and to the military relations of the continental nations with this country, observed, that *England* would not be safe without a permanent or standing army. This observation was received by the Commons, not with coldness barely, but with marked ill-temper. The previous conduct of the king, in reducing the forces to little more than twenty thousand men, should perhaps have disarmed them of a part of their jealousy. It had not however the desired effect.

The sense of danger to the country, from her external relations, in the absence of a standing army, would in ordinary seasons have prevailed over the jealousy attaching to such an establishment. But the expenses of the late war—the sparing fruits of it—and the dread of a permanent force, tended to render a military establishment, on any large scale, unpopular.

The partisans of a standing army recommended such an institution with great warmth, which naturally provoked a correspondent opposition. The press teemed with publications, that excited a general interest, and finally induced a necessity of some decisive measure that should put a question to rest, which, so long as it remained unsettled, would have a tendency to disquiet the public mind. The struggle that ensued was severe, but the issue of it was most memorable and determinate.

In a committee of the whole house on the state of the nation, at the close of the year 1697, the question of disbanding the superfluous forces, came directly to be debated by the Commons, when all the arguments of the respective parties were urged with great vehemence and effect. It was at length resolved, "That all the land forces of the kingdom, which had been raised since the 29th September, 1688, should be disbanded." The effect of this was the reduction of the forces, to a very inconsiderable number, below eight thousand men *.

The deep and sweeping operation and character of this resolution was most decisive as affecting the question, and the different parties engaged in it. The seeming asperity of it, for it undoubtedly wore that appearance, was softened by the vote of a gratuity to the officers and soldiers, who might suffer by the reduction of the forces; and his majesty was sought to be pacified by the grant of a revenue during life of seven hundred thousand pounds per annum, for the support of the civil list.

The seamen, appointed for a winter and summer guard at sea, were reduced at the same instant to ten thousand men.

To place the country in a state of internal safety and defence, on the diminution of the regular force, a bill was ordered

* *Burnet's* History of his own Times.

to be brought in, for the better regulation and discipline of the militia.

The rigid reduction of the land and sea forces, contrary to the known wishes and recommendation of the crown, and through motives, not very flattering to its feelings, must have given no slight offence to the king, who, though fond to an excess of military parade and ostentation, had not allowed that passion to lead him to the use of its influence in an improper sphere.

The king submitted, with as good a grace as he could command, though with a discoverable dissatisfaction at the resolution of the Commons; trusting that he might find the house more disposed, at some future season, to comply with his desire. Whether he acted under an erroneous impression of the disposition of parliament, or impatience of restraint in an object always dear to him, or a sense of the immediate necessity of a more extensive regular force, cannot now be ascertained; but the king, at all events, determined on making a further trial of the temper of parliament, in respect to the army, at the commencement of the ensuing session, when the members had been newly assembled, consequent on the late dissolution.

His majesty, addressing himself to both houses, at the opening of the new parliament, informed them, that he deemed it prudent and advisable in existing circumstances to maintain and keep up a considerable strength by sea and by land, as necessary to the flourishing state of our trade, the support of credit, and the quiet of the public mind at home; and concluded, by calling upon them to enable him to raise such forces, as would secure these most desirable objects.

Dear as all these considerations must have been to the parliament, as well as the king, they were not paramount with them to all others; nor were they to be promoted only,

in the contemplation of parliament, by the means pointed out in his majesty's speech. On the other hand, the means suggested might endanger, according to a constitutional jealousy entertained of all armies, those very objects which they were intended to preserve. But in addition to the natural jealousy of a permanent force, a peculiar distrust arose from the present constitution of the king's army, consisting, as it did, of a considerable number of foreigners with the native troops; which had given occasion to many expressions of discontent, and to remonstrances both within and without doors. Great dislike had been engendered by the regiments, which had been brought by the king from *Holland*; but more ill-will than all had been raised by the number of foreign general officers, who had been introduced at the head of the several departments of the army. The employment of these, in offices of primary trust, though many of them had been naturalized, had given an offence to national pride; which had been shewn during the last three or four years, in the debates of the House of Commons.

The practice of retaining such officers had been defended, on the reason of the paucity of British officers, who had known any thing of actual service, and condemned, and with apparent justice, on the ground that this practice shut the door against the future increase of experienced soldiers, by the usurpation of the offices by aliens, from the discharge of the functions of which alone the most valuable experience could flow. These causes, conjoined, disinclined the Commons from listening to the king's proposal, and moreover influenced them in coming to a resolution, which added to the pain, resulting to his majesty from the refusal of his request, the sense of positive opposition to his known and dearest wishes. The tenour of this resolution declared—

* "That all the land forces of *England*, in English pay,

* *Rapin.*

exceeding seven thousand men (and those consisting of his majesty's *natural-born* subjects), be forthwith paid and disbanded. And that all the forces in *Ireland*, exceeding twelve thousand men (and those his majesty's natural born subjects, to be kept and maintained by the kingdom of *Ireland*), be likewise forthwith disbanded."

The unexpected event, attendant on the king's request, and the aggravating circumstances accompanying the refusal of it, are said to have made so adverse an impression on his mind, as to have led to a resolution, on the behalf of his majesty, which it required some difficulty to counteract, to abandon the government, and retire to his native states.

His feelings had scarcely time to subside, when he was required to execute an official act, which must have awakened and renewed their acerbity. In giving the royal assent to the bill, providing the aid for disbanding the army—he could not forbear discovering a part of the sentiment with which his bosom laboured, by observing,—" that he thought " himself unkindly used, in the removal of those guards " from about his person, who had come over with him to " the assistance of the nation, and had constantly attended " him in all the actions in which he had been engaged."

This touching observation seems to have excited a certain sympathy in the parliament, though it diverted them not from their purpose. In answer to his majesty's appeal, he is assured in an address from the Lords and Commons, of their entire devotion and attachment to his person, and of their unshaken determination to stand by him with their lives and fortunes.

However consolatory these assurances of the parliament must have been at this interval, they were still inadequate to the removal of those painful sensations, which must have blended themselves with the discharge of a duty demanding such a sacrifice as an entire and formal separation from a

faithful band of followers, who had attended the king's person, in the intervening and eventful passage, from infancy to the maturity of age, through many and striking vicissitudes of fortune, and through those common and participated dangers, which equalise and connect in affection, in despite of the difference of rank or condition, man with man, and the sovereign even with his subjects. These sensations, which all must honour, as they are the common property and common distinction of all, prevailed over the wounded pride of the king, and induced him to make another effort to save his guards from the general fate of the foreign soldiery.

With this view his Majesty sends a message to the Commons, wherein he communicates to them, "that preparations "had been made for giving effect to their resolution, for the "transportation of the guards, who had come with his Majesty into England, and that he intended to send them "away immediately, unless out of consideration to him, the "House were disposed to find a way for continuing them in "his service, which he should take very kindly." To give greater interest to the message, it is conveyed, not only under his majesty's signature, but entirely in his own hand writing.

The Commons reply in a short but emphatic address to the king, "that they cannot assent to his proposal with due "regard to the constitution."

We should not, in sympathizing in the mortification of the sovereign, arraign the sentiments or the motives of those who had occasioned it, by regarding their public duty, however painful in its execution, and painful it must have been, in preference, and, in a certain degree, in violence to their individual feeling. It is not to be forgotten, that the parliament were now to confirm by practice, the rights which they had newly obtained in principle; and which had not been

gained by a single or uncontested struggle. They had been the causes of continual contention for a century. No wonder, then, that the fruits of such contention should be guarded with a never-sleeping care.

It would have hazarded all that had been acquired in the contest, to have allowed that acquisition to stand on a mere assertion and general declaration. It was necessary to reduce the naked right into full and perfect enjoyment, and by some signal and memorable mean. It was desirable, in this view, that the first great exercise of the right should not pass *sub silentio;* or without a notice to all parties in any way interested in the exercise of it. The more solemnly it should be insisted on, the more effect it would consequently have as a precedent in time to come.

If the manner of reducing the right into possession be considered as uncourteous, it had other qualities, to recommend it, beyond the reach or estimation of grace. In the frank and manly way of enforcing their claims, the Commons, notwithstanding the temporary uneasiness which the harshness of the act might have excited in the king, would seem to have best considered the permanent ease and security of the Crown; for by defining and acting at once on the right, in its utmost latitude, they exclude all question either of the broadness of the principle on which it is founded, or of the exertion of which it is capable.

The suggestion of the king, that the Commons might devise some course, which he should consider as a kindness, for continuing his guards, would infer, at first sight, a sufficient acknowledgment of the power of that body in fixing the number and quality of the national force, and might, in that respect, have justified some forbearance in the use of their new power, in courtesy to the Crown. But to a principle so delicate, if it ever could have been admitted, it would have been hard to ascribe a limit. If the personal

wish or convenience of the sovereign should be once allowed to influence the acts of the House of Commons, in the discharge of their duty, what boundary would be put to the applications which they might urge? Into what department might they not intrude themselves? Such wishes, if suffered to prevail in all things, would be substituted for the deliberative will of parliament, and have in that respect the force of law; or if frustrated in any, would generate discontent: and in either case would not consist with that free exercise of discretion, which belongs to an independent, and, as regards the British constitution, a countervailing power. It was infinitely more wise and safe in the Commons to resist a solicitation, in the beginning, which, if tolerated, might have acted as a dangerous precedent, and a restraint on their future freedom.

The pertinacity of the king in his attempts to increase his army, and to retain a species of force, at the time and at all times unpopular, must also have had its weight, in determining the Commons to preserve a firm and steady resolution, as the only means of obviating the present inconvenience and subsequent importunity.

The propriety of this resolve was developed in the immediate conduct of the king; who, notwithstanding the unyielding spirit shewn by the Commons in the affairs of the army, required them in a few short months afterwards, to make further provision, without shewing any particular reason for the increase of the forces, for the safety of the kingdom by sea and land.

The Commons, to put a final period to these reiterated and embarrassing demands, address a remonstrance to the throne—setting forth, among other things, "that they esteemed it their greatest misfortune, after having so amply provided for his majesty by sea and land, any jealousy or distrust had been raised of their duty and affections; and desired him to

shew marks of his high displeasure towards all, who had or should misrepresent their proceedings to him."

The king assures them "that no person had dared to give a false colour to their proceedings; and had he found any such, they would have experienced the severest marks of his displeasure."

The last act of the Commons seems to have put the seal to the rights for which they were contending; for from that time, the subject of the increase of the army, so often pressed, is entirely abandoned; and the great question, which had so long and so warmly interested all ranks of men, was definitively settled.

Some apology might have been required for the minute mention of these transactions, if the importance of them to the military state, and to the constitution, had been less obvious than it is. The result of these transactions, was, as it has been remarked, the conversion of a doubtful and dangerous power, into certain and innocuous strength—and the confirmation and establishment, when they were thought to be most weak, of the ancient foundations of our liberties.

It will not, perchance, be out of place, or too great a trespass on the reader's patience, to take a transient view of the remarkable changes effected at this most eventful period.

To this memorable æra, it will be recollected, that the Crown possessed *in fact* so entire a power over the military state, as to call it forth on what occasions and in what numbers it should choose; to dictate the course of its employment by its discretion; and to prescribe the rule of its conduct by its command. The army, in a word, was a purely passive and obedient instrument, to do the pleasure of the Crown.

It remained in this state for ages, without dispute and without jealousy, and would have still remained so, if the Crown remained, as formerly, the predominating and over-

weening power in the constitution. As the influence of the other estates, in process of time, began to shew itself, and more particularly of the Commons, so summary and commanding a prerogative began to excite the most fearful apprehensions for those rising liberties, which could no longer be repressed, and which, peering now above the ground, spread themselves around in great luxuriance. With the growth and safety of those liberties, the entire and unrestrained sway of the sword seemed inconsistent and wholly incompatible; and therefore came to be resisted, with an opposition proportionate with the danger apprehended, and with the violence of the feelings set in motion, for nearly the uninterrupted space of a century antecedent to the Revolution.

The immediate effect of this opposition was the triumph of the principle asserted in the declaration of rights; and the resulting consequence in practice, the legislative interference of parliament in the government of the national force. Though these effects would not appear in statement to be eminent or splendid, they are, in substance and in solidity, worthy all the efforts that had been exhausted in achieving them.

The declaration "that the raising and keeping up an "army in time of peace, without the consent of parliament, "is contrary to law," made the parliament, in effect, a constituent power in the creation of the army; which, thenceforward, could not look to the Crown, as in foregoing seasons, as the sole author of its being. The subjection of the force in time of peace to the consent of parliament, virtually submitted along with it the *numbers* of such force to its legislative consideration; which deliberative power was moreover assured to it, by the direct authority that it previously possessed over the public purse. So that in this simple declaration was included all that was essential in power to make a standing national army, not inconsistent with national li-

berty. It reduced it from a body created by the breath of the Crown, producible to any possible dimension, to a creature of definite shape and limit, dependent for life, character, and support on the same power, which causes and invigorates every other organ of the constitution. It subjected the instrument to be employed, and the hand that sways it, to the pervading law, which governs in every thing besides. The army from this time is neither an anomaly in its own, nor in the general constitution, and therefore no longer an object of envy or alarm.

The eventual power, following closely on the heel of the first, of legislating for the government of the army, removed the military body another step from its dependence on the prerogative of the crown; and had a tendency to convince it, that it had not only a place among the corporate bodies belonging to the State, but that the State had an intimate regard for its liberties, as well as its own, so far as they could be the objects of legislative regulation and protection in relation to the nature and design of its peculiar institution and end. Of the operation of this accessional authority of the parliament over the laws, attaching to the military body, I shall have occasion to speak in another place.

In the proportion, that the other estates have been seen to gain from the events which have been noticed, the Crown must be understood to have lost its influence in military matters. It still however retained enough of power, as will be shewn, to preserve its dignity, and to denote its superiority; as much unobjectionable sway, as is compatible with the public safety, and consistent with its own. So that if it could be supposed to have sacrificed any substantial advantage, it had acquired in return, no invaluable exchange, security, ease, internal and external quiet.

The changes, under immediate contemplation, more respect the royal prerogative, and the power of parliament, in

regard to one another, than the constitution of the military association. The latter, notwithstanding the alterations, and alternations in the authority, prescribing its origin and its conduct, felt the only sensible mutation in its condition, in the transfer of its immediate deference from one—to the three estates. The army was left, as it was found, a non-deliberative and obedient body, and in all respects the same, in organic formation, economic arrangement, and disposable service, as it had been in those times, before the disputes occurred, which had brought about the enumerated changes.

The regular or standing force consisted at this time, and ever since, varying only in numbers, according to the exigencies of particular seasons, of individuals voluntarily enlisted and enrolled.

The engagement for service, which was at first general and unlimited; has since been modified in certain instances, under peculiar circumstances, and political considerations, to a term of years, or the continuance of existing and described hostilities. Thus another objection, of a fundamental kind, arising out of the indelible character of the soldier, when once assumed, has been happily removed; a perpetual soldier, having been regarded at all times of our history, as a dangerous member of society in this land of liberty. The good effect of the regulation consisted not alone in the removal of a constitutional fear, but in the recommendation of the service in our national armies, which is no longer unnecessary engagement for life, but, like every other service of a free country, bounded by the contract and will of the parties, and therefore in no way repugnant to the minds of free-men.

The amount of the peace establishment of the regular army, since the Revolution, has increased in the ratio of the establishments, of a similar nature, kept up in neighbouring countries, and in the extent of our colonies and territorial acquisitions abroad. This species of force which exceeded

not, in the time of *Charles* the *Second*, five thousand men, was increased after the Revolution, at the conclusion of the peace of *Ryswick*, and at a season of great jealousy, to seven thousand men for *England*, and twelve thousand for the *Irish* establishment. In the reign of Queen *Anne*, the peace establishment was so low as seven thousand men for *England*, and three thousand for *Scotland*. In the beginning of the reign of *George* the *First*, after the suppression of the rebellion, the army was reduced to twenty-two thousand, six hundred and fifty-four men; and, in 1719, to fourteen thousand, four hundred and sixty-nine men, for the land service. It was afterwards raised to eighteen thousand two hundred and sixty-four men, after great debate; and was not brought under that number, during the rest of the reign.

Shortly after the commencement of the present reign, in 1763, the peace-establishment was so low as seventeen thousand five hunderd and thirty-two men.

At the conclusion of peace with *America*, the peace-establishment was fixed at forty thousand men for *Great Britain* and *Ireland:* and in 1783, and for about three years afterwards, it amounted to about fifty thousand land's men. At the peace of Amiens, 1802, which might be considered rather in the light of an armed truce, than of a profound and unqualified peace, it was allowed to number seventy-five thousand men.

The war-establishment, in the present reign, has gone far beyond all precedent in former times, and, it may almost be thought, beyond the belief of ages to come.

It would be difficult to have supposed, in other times, that any condition of things could have made it necessary for a single *European* nation, and that of no primary population compared with other States, and of a maritime more than a military character, to maintain in arms a constant and disposable regular force of between two and three hundred

thousand men, with an occasional additional force for the internal defence of the country, little inferior in discipline, and exceeding in numbers the regular army, forming together an aggregate of more than six hundred thousand men*; in accession to the naval strength, the peculiar defence of an insular position, consisting of one thousand ships of war, and manned by one hundred and forty thousand† seamen. But the times in which we live, and the events to which they have given birth, have left behind them so many signal and imperishable monuments of the fact, as to place it, however incredible it be in itself, beyond all future doubt. But what history shall hand down the mighty contingencies in detail, that called forth this singular exertion of strength, or the splendid deeds on which it was employed, or the brilliant success with which it was crowned; in which the power of the nation in its grand military display, wonderful and dazzling as it is, is eclipsed by the glory of its achievments?

Under the denomination of the regular or standing army, are included, the infantry, cavalry, artillery, engineers, invalid and marine corps, the names of which bodies of troops, would seem sufficiently to indicate their uses and services, respectively and relatively, without any separate specification of their nature, or distinction. The two latter descriptions

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* The yeomanry and volunteer corps amounted in the year 1803, to four hundred and sixty-three thousand one hundred and thirty-four effective men.

In 1811, the same species of force with the *Local* Militia numbered three hundred and fifty thousand men.

And in 1813, the regular troops, including artillery and corps employed in garrisons abroad, alone amounted to	267,000
To which may be added the last-mentioned species of force ..	350,000
The *Regular* Militia	63,000
	680,000
Seamen	140,000
Total	820,000

† Navy estimates for 1813.

of corps, in the form in which they now stand, have been instituted since the Revolution.

The occasional or irregular force of the country consists, or has consisted of late, of a variety of troops, including, among others, the militia, fencibles, volunteers, and yeomanry. The first has ever been considered the most favourable, as it is the most constitutional description of service, founded on a common principle of defence, to which every one, interested in the general safety, has been at all times liable to contribute; though his contributions, under different circumstances, have varied, sometimes being of a personal, at other times of a pecuniary, nature, or admitting the substitution in convenience of the party, liable to service, of another able and capable person in his stead.

Sufficient has been observed of the feudal militia, in an anterior place; so that the little that need be remarked here, in respect of this species of force, will, in reference to its general constitution, form the date of the Restoration.

On the abolition of military tenures by *Charles* the *Second* it became necessary to provide a force for internal defence, that should answer the ends of the feudal militia, which the abolition of such tenures tended to supersede.

The leading characteristic of the superseded body of troops was preserved in the institution of the new militia, which assumed, as a governing principle, that every person, subject to the defensive service of the realm, should, in proportion to his ability or property in the State, supply to its defence; and accordingly every housekeeper, and person of landed or personal estate, was compellable to furnish, according to his substance, men, horses, arms, ammunition, and pay. It would be now useless to describe the manner and proportions in which each was required to subscribe to the national defence; since the arrangement itself does not appear at any time to have been carried into full effect, and has

been since displaced by a more useful and more convenient system.

The force, thus raised, was liable to be drawn out in *troops* and *companies* for specified and limited times, for the purpose of exercise and training ; and, once a-year, in *regiments*, or larger bodies, within the counties, wherein it was appointed to serve, and subject to be led and conducted by the Lord Lieutenant, into any other part of England, in times of insurrection, rebellion, or invasion, according to or in conformity with directions, to be signified by the Crown. But in no case had the Crown the authority of ordering such force beyond the confines of the kingdom.

The officers, in command of regiments and companies, were named by the Lords Lieutenant; but the appointments or commissions of such officers were subject to confirmation or annulment, at the pleasure of the king. The Crown, if not in fact, had a virtual authority over the commission of the officers of the militia, in as much as it had the power of appointing Lords Lieutenant, from whom that commission emanated.—By this direct and indirect influence, the Crown had secured to it, under the authority of parliament, that command over the militia, which had been the source of so much contention and the cause of so much bloodshed in the preceding reign.

On this footing the militia continued from the Restoration till the thirtieth year of the reign of *George* the *Second*, when many expensive and inconvenient parts of the original institution were changed, and others were regulated and modified, so as to render them less burdensome to the subject. The first grand and distinctive features of this constitutional force were preserved, and in all the subsequent mutations to which it has been exposed, the original distinctions have been for the most part retained.

Towards the end of the reign of *George* the *Second*, many

changes were introduced, which in the end became so numerous, and so embarrassing, from the *detached* manner in which they were enjoined by separate and desultory statutes, that it was thought advisable, in the second year of his present majesty, to repeal the preceding enactments, and reduce the substance of them into one act of parliament. By this act the strength of the militia was fixed at thirty thousand seven hundred and forty men.

It has since been necessary to legislate in many important points, for the regulation of this force, and more particularly by the 26th of his majesty, and several other public acts. The term of service is enlarged by the last-mentioned act, from three to five years—and it is rendered lawful for the king, in case of invasion or imminent danger thereof, or of rebellion or insurrection, first communicating the occasion to parliament, if sitting, or if *not*, by a declaration in council, signified by proclamation, to call out and embody the militia, and direct it to be led by its respective officers to any part of the kingdom.

When the militia is in actual service, it is subject to the same rigorous laws with the more regular army; and during the time of its exercise and training, and while kept embodied, entitled to receive pay after the manner of that species of force.

It would carry us far out of the way, to pursue the statutes from time to time made, the aim and the result of which is to render the inhabitants of every county subservient in the first place to its particular defence, and in the next to the general protection of the realm; by rendering the service less burdensome, by an equal distribution of its duty among all persons, indifferently, through the equitable medium of a ballot; by the selection of officers, the best suited, from their degree and relation to the soldiery, and the service, for the different gradations of command; by the introduction of an

ordinary discipline, neither too rigid nor too relaxed, for a body so peculiarly constituted; by rendering the body itself more useful by extending, under fit regulations, the term and the field of its service; and by placing the immediate command of this, as of all other species of military force, under the necessary limitations, in permanent and unchangeable hands. These desirable regulations have imparted to the militia a portion of the character, and the whole of the spirit of the regular troops, without involving the expense and danger of an increased and increasing standing army.

The militia under these regulations, having all the efficiency of an established army, have on some occasions of great urgency, supplied its place, and more particularly through the intervention of a temporary statute, permitting the practice, in the late rebellion in *Ireland*. Since that unfortunate and lamentable period, the services of the English and Irish militias have been interchanged and reciprocated, to the great convenience of both countries, and to the benefit of the united kingdom, by the dispensation of the services of the regular military body from domestic uses, to more indispensable and imperious purposes. Even of late we have beheld, a most proud and animating sight, a part of this favourite force*, generously emulating the example of their more regular and more disciplined brethren, rushing with a native and genuine bravery to a foreign shore, for the purpose of sharing and participating with them, in the common toil and glory of giving liberty and peace to Europe.

Perhaps no better test could be afforded of the usefulness of this species of force, than the unprecedented extension,

* The Buckinghamshire militia, under the *Marquis of Buckingham*, and the Denbighshire, under *Sir W. W. Wynne*, volunteered their general service, which was accepted, to any part of the Continent, in the late glorious struggle for the liberties of the civilized world; and served, with great honour to themselves and advantage to the country, at *Bourdeaux*.

under different but congenial modifications, of the original institution.

Under the apprehension of an invasion from *France*, in the year 1796, a body of men, doubling the number of the then-existing militia, were rendered subject to the policy and the provisions of the militia laws, under the name of the *supplementary* militia; whereby the whole or part of this large force was made liable to the call of the Crown, under the same limitations obtaining in the employment of the original force, according to the exigencies of the times or the occasion. To this has since been added a yet greater body of men, far exceeding the other two together, under the description of the *local* militia; little varying in principle or form, from the pure constitution of the first militia.

From the extraordinary and rapid demand of troops, for the purposes of the late war, and from the disciplined and efficient state of the militia, the latter corps has held out an irresistable temptation to successive ministers to entice, if the term may be allowed, a coveted or required portion of its component members into the regular body of the army. This practice began in the administration of *Mr. Pitt*, in the year 1798, and has been often repeated since; rendering the militia, in appearance, if not in effect, somewhat of the nature of an initiatory school for the discipline of recruits for the regular service.

The admirers of this constitutional force, and they are many, have considered this as a great innovation on the original principle of the militia; and so in fact it may be. But the practice would not seem to be such a violation of the principle, as to threaten any evil consequences of a lasting and irremediable nature. It falls, in the most unfavourable light in which it can be viewed, within the legitimate reason of public expedients, that necessity sometimes devises, and must at all times justify, in the accomplishment of a general

good, through the medium of a certain but partial ill. There is another view, of which it is capable, and wherein the originators of the measure would seem to have contemplated it, that demands not so strict an apology for the practice; considering the act, not as a primary measure of policy, trenching on the limited institutional foundation of the militia, but a resulting consequence of the *undue extension* of the *militia system*, beyond its original bearing, which had interfered with, and at length impeded, under the extraordinary but temporary exigency of a regular disposable soldiery, the common and necessary supply of the standing forces. Hence a transfer of a part of the militia to the ranks of the latter description of troops, became, in this view of the transaction, not politic only, but, under circumstances, indispensable. The mode of transfer was certainly the most easy and unexceptionable, compelling not any new course of service, but leaving the future direction of it, entirely at the will and choice of those, who were the immediate subjects of it. But it were safe to quit a question, which would require a more rare combination of abilities, statesman-like and professional, to decide, than can be imagined to fall to the possession of a writer on a prescribed and confined subject.

The *fencible* corps, which constitute another part of the force, now under review, were introduced, for the first time, towards the end of the reign of *George* the *Second*, and have been occasionally kept on foot, more or less in numbers, to the present day. They partake very closely of the character of the militia, in the locality of their service, and the similarity of the rules or laws, which determine and govern their constitution. They differ so little in essentials from the former force, that a more particular description would seem superfluous. They are not, however, like the militia composed wholly of infantry, but are a mixed body of troops, regimented or formed into companies of horse or foot indiscriminately.

To these was added, in the late war, a description of troops, hitherto unspoken of, called the *sea-fencibles*; formed, as the term would denote, of seafaring men, scattered along the surrounding shores; a species of force wisely and eminently adapted to the defence of an insular country.

Of the remaining species of occasional force, the *volunteers* and *yeomanry*, a short and single description will serve. The two corps, though widely dissimilar in name, are, except in the distinctive destination of their services, one being devoted to the infantry, and the other to the cavalry, almost in every respect the same. Both owe their rise, like many other incidents not less remarkable, to the novel character and circumstances of the late war with *France*; which was the means of drawing forth the inherent and hitherto unexplored strength of the empire, and of discovering the patriotic energies of which it was capable, more stupendous even than its strength. Passing over the first foundation of these corps, as existing previously to the circular letter of *Mr. Dundas*, in the year 1797, and the progressive improvement they received by the new spirit infused into them by that celebrated appeal, the mind eagerly presses forward to the stage, when the institution is seen in its full and meridian splendour. At that awful juncture, we must view it then, as the general enemy of the repose of nations, having scarcely drawn his breath, after the short-lived respite of the contest, in the truce of *Amiens*, was preparing to throw his armed myriads into the bosom of our native land—to deform its beauties—to destroy its liberties—to desolate its cultivation—to depopulate its living strength—when an unexpected army, without any other motive than the sense of the blessings it had at hazard, and the mightiness of the impending danger, springs up in an instantaneous effort from the earth, in an embattled line (along which what eagle eye can glance?) of more than half a million of freemen; self-armed, self-instructed, self-sus-

tained, self-devoted to the cause of country. I am not speaking of the fabled exertions of romantic times—of the faded and fading records of history—but of breathing and living truths. Such a spectacle did the volunteers present, in all the strength and solidity of reality, in the year 1803.

This variety and extent of military force, is at the immediate disposal of the Crown, as exercising the chief military command over the national armies. This it has exercised from time immemorial, and in various evolutions of government, with unabated vigour and freshness, and, in former seasons, it held a sway not less full and absolute in the raising, organization, and rule of the army, and in all and every matter appertaining and incident to it—calling forth, at its will, the military strength of the realm, in such proportions, as it chose at any time to prescribe; directing,the economy and discipline of the troops—and dictating the laws, as we have seen in the course of this inquiry, by which they should be governed.

This formidable prerogative remained untouched, in the hands of the Crown, until the date of the Revolution; when the safety of the people, and, by some it may be supposed, the safety ot the Crown, required, that it should receive and acknowledge some limit. This was fixed, in the first instance, by the declaration of rights, which declared a standing army to be illegal in time of peace, when only it could be a dangerous organ, without the consent of parliament; thus virtually disbanding the army with the surcease of the event, which had caused it to be embodied, and which alone could authorize its being maintained; and by the required circumstance of the consent of parliament to the peace establishment to be kept up, necessarily submitting the numbers, to be retained, to the same determination.

To this express and direct limitation of the military prerogative generally, a second but indirect limitation of a par-

tial nature was in effect added by the interference of parliament by statute, 1st *William* and *Mary*, on the occasion of the mutiny at *Ipswich*, which, acting as a precedent, had the tendency of drawing to the parliament an universal and permanent jurisdiction or right of legislation in military offences of a grave and weighty character, which it has never since abandoned; still leaving to the Crown, a concurrent, if not an exclusive legislative power over offences not specified by the mutiny act, so that such power do not trench on life or limb.

Except in the particulars, immediately noticed, the military prerogative of the Crown is as complete at this day, as in precedent times, and more particularly at the Restoration; when a solemn recognition of its extent, as then existing and acknowledged, was given in the preamble of the 13th and 14th of *Charles* the *Second*, asserting, "the sole and supreme power, government, command, and disposition of the militia, and of all forces by sea and land, and of all forts and places of strength (within all his majesty's realms and dominions), is, and by the laws of *England* ever was, the undoubted right of his majesty and his royal predecessors, kings and queens of *England*.

So that if much shall appear to have been taken from the military prerogative at the time of the Revolution, much also will appear, from the bare recital of its comprehensive scope, to have been still left to it.—If it hath not the sole power in all things, it has the supreme and unparticipated authority in most.

The Crown hath, now, as at all former periods, the prerogative of declaring peace and war—It hath the sole commission of raising or enlisting, and in that respect the selection of the troops, and the immediate command, when raised and commissioned, of the national army and navy—and as connected with this, the choice and appointment of officers

of every rank and degree throughout the regular military and maritime establishment, and the approbation and right of removal of all others, in every other description of troops within the realm—and, as a necessary concomitant of supreme command, it hath the direction and disposition at all times of the forces, in every expedition or service, within and without the realm. If it hath not the power, of itself, as heretofore, to make and declare the laws for the government of such forces, it hath the sole right of erecting the courts, through which they are to be administered; the constitution of the kingdom having confided to it the whole executive power of the laws; and the mutiny act, carrying its deference still further, has empowered the Crown to communicate, by the royal commission or warrant, the pre-eminent part of the prerogative, to erect and constitute courts-martial, to others whom it shall think proper to name.

Considering the great and complicate military power yet resident in the Crown, one might think that the interposition of parliament, in circumscribing a part of its luxuriance, would be hailed as a relief from a burden. If this power had been left entire, and unimpaired, it might well be supposed, that, in the large and unparalleled armaments, and the most abundant military operations, which have subsequently succeeded, it would have been felt too bulky and too unwieldy an instrument for a single, though a royal hand to manage. But be this as it may, it is clear, that the rescindment of that portion of the military prerogative, which took place at the Revolution, has been the means, not of diminishing, but increasing, strange as it may sound, the substantial power of the Crown. The removal of the jealousy of this prerogative, by the limitations put upon it, has had a direct and visible tendency to augment the national armies,

to an amount beyond any calculation, which could have been preconceived, at the time of the introduction of such limitations; giving birth to an influence of another sort, arising out of the number of offices connected and related with such armies, directly and indirectly, which may, without any exaggeration, be said to counterpoise the whole of the strength, of which the Crown had been previously dispossessed*. Whether this may be felt inconvenient hereafter, it would be a matter more of speculation than of practical use, on the present occasion, to inquire. The good effect of the change has been abundantly shewn, in the forces which have been cheerfully drawn at all times from the heart of the land, and sent forth, without alarm, to assert the rights, or to protect the dearest interests of the country, and more especially in a season, from which we are but newly extricated, when they were assailed by so impetuous and so overbearing an enemy, that not a hand could be withheld, in any jealous policy, from serving to its defence. This so proud a test of our military system in practice, as well as theory, would discourage any hasty or intemperate attempt to disturb it by the introduction of speculative or problematical arrangements.

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* *Blackstone*, speaking of the officers of our numerous armies, and of the places which the army has created, observes—" All which, put together, give the executive power so persuasive an energy with respect to the persons themselves, and so prevailing an interest with their friends and families, as will amply make amends for the loss of external prerogative." And again, a little lower,—" They are kept on foot it is true only from year to year, and that by the power of Parliament; but during that year they must, by the nature of our constitution, if raised at all, be at the absolute disposal of the Crown. And there need but few words to demonstrate how great a trust is thereby reposed in the prince by his people. A trust, that is more than equivalent to a thousand little troublesome prerogatives."—*Blackstone's Comm.* vol. 1, page 336.

Having traced the rise and progress of the military state, and military policy, through many eventful centuries and changes, more perhaps in detail, than either the occasion demanded, or the reader possibly desired, I shall turn to the pursuit of the more important branch of this inquiry, the march and progress of the military law.

CHAPTER V.

Of the Law Military, as now obtaining.

WHETHER the armies of any State be of a temporary or permanent character, it is an early discovery in military policy, that they cannot be held together, so as to fulfil the end of their institution without some obligatory regulations of their own. Without adverting to the social interests of the State in general, which such armies are designed to promote, the very principle of self-defence must suggest the necessity of some rule, applicable to the peculiarity of the association, to combine and connect, with an inseparable chain, the services and efforts of individuals, in mutual support, one towards another, whence the safety of the whole must flow. This is naturally the first bond in such an union: which afterwards leads to others of a like nature to ensure greater order, unity, and consequent energy of action, in resenting and repelling invasion from without.

As the use of military bodies extends, in the natural progression of things, from mere defensive purposes to those of aggression and offence in all their variations, further restrictions become requisite to preserve the order and discipline of the members of the military community in their more complicated views and relations to one another, and to enforce the observance of the duties, which they owe from the law of nations even to their enemies; constituting the difference between barbarous and civilized warfare.

The next great stage of improvement, to which all national armies, in the course of civilization, almost necessarily tend, is the erection of occasional service, for the sake of perfection

in its operations, and the general convenience of society, into a separate professional avocation; when a new necessity arises, out of regard for the safety of the State, consenting to, or instituting such establishment, for strict, formal, and appriate laws, in order to restrain it in due dependence and subordination on the power whence it originates. The arrival at this state is gradual, and more or less expedited, by the constitutional disposition of States to admit or to repel such establishments.

The progressive and contemporaneous movement of our military associations and ordinances, for they have travelled as it were together, from the one state to the other, has been comparatively slow, from the causes which have been already explained.

The principle of military obligation will be found to have conformed at all times to the circumstances of our military institutions, and the general spirit of the laws. Thus in the early or ruder ages, it is distinguished by the generous quality of the government, and the free habits of the people. Military law is then more a branch of the law attaching to the whole community, than a particular obligation, as the military association at the same time, is nothing more than the assumption by the whole community of a new posture or character; every member, if not actually serving with the army, being liable to military service.

On the importation and introduction of the feudal system at the Conquest, and with it the numerous incidents of feudal service, the army, varying in its constitution, is no longer an association of armed citizens, for the protection of their common and mutual rights, but a body of men separated from the society at large, united and knit together by a new tie, fundamentally altering their original relation as soldiers.

Military duty springs not here from any general source, but out of a particular interest. It is from this time governed

not by the force or sense of an universal obligation, but by a partial reward or inducement to service, furnished not by the State, but the feudal chief, to such as shall choose to accept it. Hence the service originates and ends with him who rewards it, and as he directs the service itself, he of course commands all the circumstances and incidents of it. By a natural consequence, the feudal lord presents, at length, the laws to those who serve, as well as the principles and rules of the service.

The effect of such a system on civil liberty, and the laws by which it is upheld, must always be considerable; but more or less according to the perfect or imperfect establishment and influence of the system. Its operation on the military community, when it exists, is direct and decisive. It reduces it to a state of strict and unqualified dependence on the feŭdal lord, from whom it takes, in all things, its commands, whether in the shape of temporary orders, or mandates of a more lasting and perfect kind.

During the predominance of the system, in *England*, the sovereign, as the grand feudal lord, exercised this unlimited and unrestricted command. The power even continued after the system had ceased. The military part of the feudal policy was formally abolished, as we have seen, at the Restoration; but the successive kings of *England* uninterruptedly exercised the right of commanding and legislating for the army, to the period of the Revolution.

Some of the warlike ordinances, in which the exercise of this prerogative is exemplified, have been enumerated in a preceding chapter. The binding force of these on the military body has never been disputed, though the authority and the name of law has been sometimes denied to them. It is true, that such ordinances have not the universal application, nor the durable quality in their existence, nor the same *origin*, with the general law of the realm.

But notwithstanding the absence of these distinctive qualities, they have other marks about them, such as prescription and necessity, those strong resemblances of law, that are often and unscrupulously admitted in its stead. It seems always to have been a question about terms, more than of substance, though it has been warmly and inveterately contested, whether these warlike ordinances, having the undisputed force of statutory regulation on the military body, should or should not be honoured, in legal consideration, with the title of law. But this question, whatever its original merits, should never have arisen again, to disturb and divide the minds of the learned or the curious, after the date of the Revolution; when the military state and the military law underwent together a most essential change.

From the last-mentioned event, the army, as a standing military association, assumed the form of a known and acknowledged constitutional body, having a declared shape and legal existence, determinable, as that of all other bodies of like conformation, by the power creating it. From the time it became an organ of legislative creation, it became also an object of legislative control. Hence the institutions for the government of the army have been derived directly or indirectly from the same source with those that affect the general body of the community. If the alteration in the state of the army had chanced to have been overlooked, one should have believed that the direct exercise of the right of legislation for the army, would have been too striking a circumstance to escape the eye of the most negligent examiner of the principles or progress of military law. And yet, noticeable as it is, it does not appear to have been always observed by those who have treated on the subject.

Long after the statute book had admitted a variety of sound rules for the government of the army, and incorporated them with the great body of institutes, for common and ge-

neral observance; professional lawyers, of high eminence and character, have hesitated to associate such rules, notwithstanding the authority which they are wont to attach to the book in which they are written, with the ordinary letter of the law. Though they are both written by the same hand, in the same character, and in the same registry, yet they have seen such distinctive and opposing principles about them, as to mock and forbid an union by any process of their art. This shews how universal the influence of prejudice is, since the proudest intellect is not exempted from it.

The long imbibed jealousy of regular armies, and of the prerogative of the Crown, in the uncontrolled command of them, and the spirit of the times, in which they severally lived, might have led *Sir Edward Coke* and *Sir Matthew Hale** to express themselves as they have, of the military bodies, and the military regulations, of their own days, as institutions of indulgence, and not of law. It is much easier to account for any seeming prejudice in the impressions and writings of those learned men, than for the deliberate adoption, and avowal of the same prejudice, under the most dissimilar circumstances, by the learned commentator on the laws of *England*, as it has been vehemently but unjustly charged against him †. The charge has arisen out of a loose and general expression in the Commentaries, which has been considered, it is believed, by itself, without a due regard to the context, by which it is qualified, and may be satisfactorily explained.

It is to be regretted, that the same precision ‡, which is every where so remarkable in the writings of the venerable and learned author of the Commentaries on the Laws of

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* The first of these eminent personages lived in the reign of *James the First*, and the latter in the time of *Charles* the *Second*.

† See *Tytler's* Introductory Chapter. ‡ *Ibid.*

England, is not so much discoverable in that part of his subject, which touches on the military state of the kingdom, as on the other mixed heads, which he has so elaborately, and so happily handled. This is the more to be lamented, as the errors of such men (if errors they may be presumed to be) are likely to go unquestioned, and to pass without examination, from weight of authority and celebrity of name, as current legal truths.

It has been thought, that *Sir William Blackstone* had asserted, as a general principle, that *martial law*, notwithstanding the assumption in the term, is not entitled to the description and character which it bears. But it is to be observed, that the learned judge, when speaking thus unguardedly of the law martial, founds himself, as he acknowledges, on the express *dictum* of *Sir M. Hale*, "that it is in truth and reality, no law, but something indulged, rather than allowed as a law." He is led to the observation, by an immediate review of circumstances, formerly affecting the military state, and the ordinances by which it had been governed, but which, at the time of his writing, had ceased to exist. The learned judge is speaking in the style and spirit of history, not indulging in any comment on existing institutions. He describes the methods and practices resorted to for raising the ancient armies, as severe and rigorous; and characterizes such bodies, and the regulations which apply to them, as *excrescences*, "bred out of the distemper of the state," and then breaks forth into a gratuitous remark, borrowed from *Sir M. Hale*, prefacing it by a description of martial law, such as then glowed on his imagination, from the description he had just drawn of it; but in which picture the features of the law military could not at this day be recognised, nor would they have been known even at the season at which the learned judge wrote. He speaks of something, to use his own terms, "built on no settled principles,

and entirely arbitrary in its decisions," and whence he ventures to call it, not a legitimate member of the body of the law, but an *excrescence*, "bred out of the distemper of the state."

It is clear, that the ingenious commentator on our laws, though the passage alluded to may, in a hasty and indigested consideration, be supposed capable of such a construction, could not have intended that it should have been taken, as descriptive of the quality of the law military, as prevailing in his own times.

Mr. Justice *Blackstone* wrote his celebrated work in the reign of his present majesty, and from his profound erudition in the laws of his country, must have been presumed, at that time, to know, that the method of raising and continuing our armies, such as were then constitutionally known, and the regulations formed for the government of them, were, and had been sanctioned from the time of the Revolution, by the deliberate act of the legislature: but there is no need of this favourable presumption, since the venerable author himself, almost in the same page with the remark under contemplation, recognises, in express terms, the lawfulness of regular armies, as they exist in this country, justifies the policy that calls for the institution, and the continuation of it even in time of peace; and afterwards proceeds to consider the law, which is annually passed for the maintenance and discipline of the soldiery, treating it with the same respect, as any other legislative provision, originating from the same source; not questioning its binding authority, though recommending, through a feeling of humanity, some relaxation or abatement, in the season of peace, of the rigour and severity of its penal enactments *.

* In page 413 of his first book, the learned judge observes—" But as the fashion of keeping standing armies, has of late years universally prevailed over *Europe*, it has also for many years past been annually judged necessary

It cannot be denied that the learned judge, though by no means averse from admitting the force and the quality of martial law, is not a blind or a professed admirer of its enactments, as they stood at the time of his contemplating them. He considers the general provisions of such law as too rigorous in time of peace—and not sufficiently specific in what they enjoin, or in the punishment assigned on all occasions, to a neglect or disobedience of those injunctions; and he complains, that they define not the crimes which they design to punish, nor the punishment which they award to the crimes, but leave the one and the other too much to the discretion of the executive, or to the judges whom it may appoint. But these supposed imperfections of the law military are pointed out with the usual characteristic candour and liberality of the learned judge, with a view to their amendment, and with a friendly suggestion of the manner in which they may be reformed; not in a spirit (for who could suspect the author of the Commentaries of yielding to such a motive?) to make the objects of such law rest uneasy under its operation.

If the motive of the learned judge has not been arraigned,

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by our legislature for the safety of the kingdom, the defence of the possessions of the crown of *Great Britain*, and the preservation of the balance of power in *Europe*, to maintain even in time of peace a standing body of troops under the command of the Crown, who are, however, ipso facto disbanded, at the expiration of every year, unless continued by parliament." And afterwards, page 414—" To keep the body of troops in order, an annual act of parliament likewise passes, 'to punish mutiny and desertion, and for the better payment of the army and their quarters.' This regulates the mannner in which they are to be dispersed among the several innkeepers and victuallers throughout the kingdom, and establishes a *law martial* for their government." In the same page, an earnest recommendation is ventured of a more lenient adaptation of the law martial to the interval of peace.

the alleged incautiousness of his zeal, the incorrectness of his premises, and the vicious course of his reasoning, for enforcing the desired reformation, have been reprehended by the same author to whom allusion has been lately made, who holds, as it should seem, a different, but perhaps not a sounder or more accurate opinion, than thel earned judge, of the military constitutions of their common country.

Sir William Blackstone, after having been charged in the first instance, but as it has been shewn, unreasonably, with having ventured a position, " teeming with error, with inconsistency, and with misrepresentation," is next censured, also without any fair cause, it is supposed, for having expressed a regret, " in a similar spirit of *false reasoning*" (as it is said), that the soldiery " should be reduced to a state of " servitude in the midst of a nation of freemen; for *Sir* " *Edward Coke* informs us, that it is one of the genuine " marks of servitude, to have the law, which is our rule of " action, either concealed or precarious: *Misera est ser-* " *vitus, ubi jus est vagum aut incognitum.*"

With a view of exposing the falsity of the learned judge's *reasoning*, or more properly speaking, of his premises, a number of interrogatories are proposed, and triumphantly answered by the interrogator himself, which are imagined to place the matter beyond cavil! In the following rapid way is the modest and ingenuous commentator on the laws of *England* put to the question. " But where, it must be asked, is the country here alluded to, where the military law is either vague or precarious, or unknown? Surely it is not *Britain!* Can that law be termed vague or precarious, which consists but of a very few simple regulations, deliberately enacted by the whole branches of the legislature, renewed it is true, in their binding obligation from year to year, but scarcely undergoirg even the most trivial altera-

tion? Can that law be termed concealed or *unknown*, which receives not only the ordinary promulgation of all other acts of the legislature, by its entry in the British statute book, but which must, by positive regulation, be repeatedly inculcated on the memory of every individual of the military profession? for the articles of war, the substance of the military code, must be read at the head of every regiment once every two months. How then can it be with justice asserted, that the law is either concealed or precarious? Such positions are equally *absurd* as they are *mischievous*." After expressing some pain in offering the foregoing remarks, the author thus excuses himself:—"But I plead here the cause of the military profession, which is injured, and degraded, through *actual ignorance* of the nature of its establishment and laws *."

Whether the cause stood in need of an advocate may admit of some doubt; but there can be none, it is presumed, on the insufficiency of the defence, which has been made for it. It leaves the ground of the learned judge's regret, taking on credit all that is stated or argued, wholly in his own possession and almost undisturbed. The willing advocate of the military profession chooses to consider the circumstance or manner of the publication of the law, and not the quality of it, to have been the sole subject of regret with the learned judge, whereas the latter is the whole burden of his complaint. The learned judge had stated the law to be vague and unknown in its letter or meaning, not in the manner of its publication—that the provisions of it are indefinite, and therefore uncertain and unknown; not that they are unpublished or concealed. The advocate is arguing on different premises, and his conclusion, be it right or wrong, applies not to the positions of the learned judge. It may be

* *Tytler*, page 20, 21.

admitted, in the full extent, that the law military is not only published in the ordinary way, in which all other acts of the legislature are published, but that it is made known by repeated and extraordinary promulgations at stated periods, particularly calculated to make impression. But adopting the advocate's own course or method of argument—what then? Is the quality of the law more certain because it is more frequently or publicly proclaimed? Or rather is not the property of the law the same, whether it be once or one hundred times published? It is not necessary to stop to answer such a question. The remaining inference, "that because the military law consists of a very few simple regulations, yearly enacted by the legislature, but scarcely undergoing even the most trivial alteration, it cannot on that account be vague or precarious;" is not only foreign to the argument,* but indecisive in itself. The fewness and simplicity of the provisions of any law, do not necessarily imply, that it is incapable of different interpretations; while it is possible, on the contrary, that it may be vague or precarious from the very circumstance of the provisions being few and simple, and therefore not enough explanatory, so as to render it certain.

On such grounds as these, for I cannot perceive that any other are resorted to, it is surely too much to condemn such a writer as *Sir William Blackstone*, of the error of false reasoning—to tax his positions as absurd and mischievous, and to reproach his understanding with *actual ignorance* on a subject, which he undertook, rashly and inconsiderately, as the imputation assumes, to treat.

It is a circumstance, somewhat curious, that the censure proceeds from a party, who himself acknowledges the truth of the judge's complaint, in other places, which he questions and denies in this. For what can be a greater proof of the vagueness or precariousness of the law military in certain

instances, than that it deals out unknown punishment against unknown and undefined offences? But to pursue the author's own words, in the description of certain offences, which he thus notices, "Of these a court-martial, which is in the "highest sense a court of honour, are themselves appointed "the *sole judges* or rather the *legislators*; for it is in their "breasts to define the crime, as well as to award the punish-"ment*." In the next page he tells us, that the heaviest punishment, short of life or limb, may be inflicted on soldiers, for offences not more specifically set forth, than under the generalising term of "immoralities, misbehaviour, "or neglect of duty." He also shews, that the law is so little certain, that it is not always known, what offenders, as well as offences, it does or does not embrace, alluding to the case of *half-pay officers*.

As much is conceded here, as the learned judge has at any time required; for he hath no where thrown out any general aspersion on the military constitutions. But the author of the military essay has not only in fact admitted the premises of the learned judge, but the point and strength of his argument, and in express terms. "To the truth," he says, "of "*Sir E. Coke's* general maxim all men must subscribe; the "conclusion flows necessarily from its premises: but if those "premises are *false*, when predicated of the British government "(he should have said the military law as affecting the British "soldiery, for the government is not alluded to) as now exist-"ing, the conclusion with respect to it, must fall of course†." But, if *true*, the conclusion must of course stand. Now the author, as it has been shewn, has indirectly, but fully admitted the truth of what was predicated by *Sir William Blackstone* of the military law. And therefore the consequence is self-evident and irrefragable.

* *Tytler*, page 109. † *Ibid.* page 21.

The honest observations of the learned judge could never have had the effect of *injuring or degrading* the military profession, as it is said, had they even proceeded on grounds less tenable or strong; unless it should be held injurious to attempt the reformation of what is felt on all sides to be imperfect. If in the admiration of a professional lawyer, he has shewn too great a love of precise and rigid forms, in the general texture of penal enactments, and a desire to extend them, for the sake of the certainty and safety of those to whom they relate, in provinces, where they cannot be admitted in all their exactitude, one may applaud the zeal, though the prudence in the direction of it should in some sort be doubted. But he would not seem to be entitled to the same allowance in public consideration, though acting under the same influence, who supports a system, with its known faults, because it happens to fall under his casual and temporary favour. The adopted child will often be regarded with as warm an affection as the natural one, but in the one instance it is the effect of combined and reasoning causes, in the other a spontaneous impulse. A transgression in the bounds of the latter will therefore be more excusable, in as much as the error arises out of the excess of a less calculating and less controlable passion. It happens alike in both cases, with the natural as well as the adopting father, that he discovers exclusive qualities in his own, which he recognises not in any other.

In this way we must account for and excuse the partiality of *Sir William Blackstone*, if he shall appear not to acknowledge the merits of any system of legislation; having not all the symetry and regular features of the law, the natural object of his affection; and extend also a correspondent measure of indulgence, not too nicely meeted out, to his opponent, if he has fancied in the wilder and more irregular features of the law military, a peculiar quality, which con-

sists not with the common notions of legislative perfection. But though we may be inclined to find an unsolicited, and perhaps unrequired apology, for the errors of the respective authors, we necessarily admit that we cannot look to the works of either for an impartial delineation of that of which we are in search. One may be supposed to paint the law military in too faint, the other in too glowing colours. The truth may be thought to lie midway between the two, or, perhaps, some other medium may be found, from which we may draw a more legitimate and safer conclusion. It could not be reconciled to my own feelings, nor rendered endurable to those of others, if after venturing to question such eminent authorities, I should substitute any unsupported notions of my own in their place.

My humble office has been to clear the way, in as much as I have been able, to the plain and liberal understanding of military or martial law, as it exists, by removing some preliminary prejudices, that have been entertained against it, and which have had a tendency to impede its progress and reception; and by deprecating the effects of certain partialities, which, through indiscriminate and injudicious praise, have raised the character of it, beyond its intrinsic merits, and may thus enervate, if not forbid those attempts that are necessary to speed this, as every other branch of legislative arrangement, through the intermediate stage from probationary policy to experimental perfection, from legal rudiments to legal rules. Hoping that this office has been in some degree, however imperfectly, discharged, I shall proceed with my general design.

The law military, of which I propose to speak, comprises a body of rules and ordinances, expressly laid down and prescribed by competent authority, for the government of the military state, considered as a distinct community; attaching to the members of such state, in their individual as well as

collective capacity; regulating the conduct of each in all that concerns him in his primary and relative duties; in what he owes to himself, to others, and to the society of which he is a part.

It is an accumulative, not an abrogative law. It substitutes not itself for the common law, neither does it release the military community from the operation of the general law of the land.

The latter, on the contrary, claims its superiority, from the transcendency of its nature, over any particular or partial law. Though the citizen becomes a soldier, he is nevertheless a citizen. He throws not off thereby his dependence on, or protection through the universal law, seeking and establishing the security and happiness of the entire body, of which the military institution itself, though it is in some respects to be considered as a sole society, is in reality nothing else than a component and constituent part. All that the law military purports and effects, is the imposition of new, obligations on those, who fall within its jurisdiction, in their quality of soldiers, necessary to enforce the duties of their acquired relation, in addition to those, which were previously required of them in their general quality, as common citizens of a common State.

The law military, so far as it is connected with our inquiry, does not in any way interpose itself in regulating or adjusting the civil rights of those who fall within its cognisance. Those rights stand altogether under the care and control of the ordinary law. Nor does the military law affect to redress civil injuries, unless they shall be in some degree connected with the interests or safety of the military state, as having a tendency to disturb its peace or quiet. Otherwise civil injuries or *private* wrongs, not immediately related with the rights of the soldier, as a soldier, are left, like his civil rights, to the redress of the general or common law.

The articles of war, indeed, provide, "that in the garrison "of *Gibraltar*, the island of *Malta*, or in any place beyond "the seas (a broad latitude), where the king's forces are, or "may chance to be employed, and where there is no form of "his majesty's civil judicature in force, that the general, go- "vernor, or other officer commanding in chief, may appoint "general courts-martial, for the trial of any such persons un- "der his command, accused of wilful murder, theft, robbery, "rape, coining, or clipping of the coin of *Great Britain* or "*Ireland*, or any foreign coin current within the garrison or "place under his command, or of having used violence or com- "mitted any offence against the persons or property of any of "the king's subjects, or of any others entitled to the king's "protection; and the persons so accused, if found guilty, "shall suffer death, or such other punishment, as by the sen- "tence of any such general court martial shall be awarded." *The fourth article of the twenty-fourth section* *. But this

* It will not, it is hoped, appear presumptuous to suggest a more precise modification of an article, involving so much and such weighty matter of criminal jurisprudence. It is therefore humbly submitted, that the article, in its present form, conveys or may be taken to convey, and is therefore liable to misinterpretation, which might by possibility produce the most serious consequences, a much greater discretionary power to courts-martial, than the framers of it ever could have intended to communicate; more certainly, than any legal notion can comprehend; from the general way in which the penalty is denounced against the very dissimilar species of crimes enumerated in the articles, it is feared, that it is left, very undesignedly no doubt, to the court-martial to award *death*, if it shall so think fit, to the very secondary and comparatively trivial offences, of assault or violence against the persons or property of his majesty's subjects, equally with the more heinous and aggravated cases primarily described therein. The article assigns *one* indiscriminate punishment to *all* offending under its letter; but with a power of mitigation, in the breast of the court martial in every fit case, of the severity of the sentence. It is not practicable by any known standard of construction, to consider the *certain* award of death, and the discretional or *uncertain* punishment, mentioned at the conclusion of the article, as disjunctive or several punishments, adjudged or intended

provision does not proceed on the principle of martial law, but on reasons quite distinct from it. It is founded on the general right of the subject to the administration of the British law, in every situation where the British influence prevails, by the possession of the supreme local power, and on the particular prerogative of the Crown, in failure of the common means to avail himself of such benefit, which is said to be his birth-right, to create the means of ensuring it by the erection of tribunals, so far as the nature of the case will admit, to administer that benefit, and to such extent, as is compatible with the peculiar situation of the subject—from the circumstances attending his local residence. In as much as the provision relates to other than *British* subjects, it goes on another ground separate from those assigned, *i. e.* on the resulting protection, allowable and claimable by strangers, in return for the temporary allegiance which they are supposed to owe and pay to the local sovereign, while they peaceably remain within his territory or dominions. Not

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to be adjudged to different classes of offenders. The *subjects* within the comprehension of the article, are " such *persons*, accused of wilful *murder*, " *theft*, *robbery*, &c. &c.;" and the *objects* of punishment, are " the persons " *so accused*," accumulatively designated. It is not possible, it is apprehended, to sever one description of offenders from another, by any distributive process or construction, " reddendo singula singulis," by an allotment of part to part, according to their visible relation or affinity to one another, to reconcile the vindicatory part of the article to legal or equitable sense. For instance—if the discretional or *uncertain* punishment should be thought to be *substantively* applicable, and applicable *only* to the offences of *private* injury—as *assault* or other species of violence—then the *certain* punishment (death) is in the other offences, first set forth in the article, awardable in *all* cases; it is an immutable, immitigable sentence; and the result would be, that *theft*, whatever the value stolen, whether constituting a grand or a petty larceny, would be subjected to all the pains inflicted on the horrible crime of murder. Now this could not consist with any idea of retributive justice, or ordinary conception of law. Either of these constructions, and a third cannot easily be devised, would seem to induce a necessity of some amendment in the article.

only has the Crown a power, in the circumstances explained, to erect courts for inquiring into and redressing public wrongs, and personal injuries—but it is bound by a reciprocating duty, inseparable from the prerogative, to provide suitable courts, for securing to the subject, and indeed to the temporary sojourner, all the civil rights and immunities to which he is entitled under the British law, in as much as they can be consistently enjoyed in his existing condition. These rights on the one hand, and the mode of guarding them on the other, do not, as it will immediately be seen, grow out of the authority of the military law; but of the exercise of a prerogative belonging to the king, as the chief civil magistrate. It is to be remarked too, that it is an exercise of the prerogative in an extraordinary and necessitous case—when otherwise there would be a deficiency or a failure in the enjoyment of the common rights of the subject. The power to erect courts is not necessarily given to the general, in his military capacity; but might be granted to any one in a civil department, at the pleasure of the Crown.

The law, acknowledged among the principal nations on the continent of *Europe*, under the description of martial law, has an unlimited sway over those who profess the military life. The military state, from the more arbitrary notion of the Continental governments in general, is there more a dependence on the sovereign authority than a popular institution, founded on popular principles. The soldier, the moment he puts on the uniform, the badge of the military profession, passes under a new master and new laws, and is from that instant insulated from the great body of society, and the rules which respect it. But in this free and favoured isle, every subject has a general property in the law, and the law in *him*, which no particular act of his own can avoid or defeat; a right given to him, not for his own protection only, but also of his fellow-subjects. It would be, no doubt, a

weakening of that security, not by the force of example merely, but by direct interference with the rights which all have in the administration of the ordinary law, if he were allowed, however willing, to withdraw himself without its jurisdiction, so as to affect others in their remedy arising out of the common laws of the land. The truth of this doctrine, if not the grounds of it, is recognised in the argument of the *Earl* of *Rosslyn,* in his celebrated judgment in the case of *Grant* *.

When the nature of the military state is considered, with the principles, and ends of its association, the necessity of particular rules for its government must be instantly and almost instinctively acknowledged; not for the direction of it internally alone, but in its external relation to things in contact with it. From the evil it might experience in itself, and the more diffuse and dangerous evil consequences it might

* The *Earl* of *Rosslyn*, in Trinity Term, 1792, speaking of martial law, thus expresses himself,—" Where martial law prevails, the authority under " which it is exercised claims a jurisdiction over all military persons in all " circumstances; even their debts are subject to inquiry by a military authority; and every species of offence committed by any person who appertains to the army, is tried, not by the civil judicature, but by the judicature " of the regiment or corps to which he belongs. It extends also to a great " variety of cases not relating to the discipline of the army, but relative to " that state which subsists by military power, as plots against the sovereign, " intelligence to the enemy, which are all considered as cases within the cognizance of the military authority. In the reign of King *William*, there was " a conspiracy against his person in *Holland*:—the persons guilty of that " conspiracy were tried by a *council of officers.* There was also a conspiracy " against his person in *England*; but the conspirators were tried by the " *common law.* Within a very recent period the incendiaries, attempting to set " fire to the docks at Portsmouth, were tried by the *common laws.* The delinquencies of the soldiers are not triable here, as in most countries in *Europe*, " by *martial law*; but generally where they are offenders against the civil " peace, they are tried by the common law courts. *Therefore* it is totally " inaccurate to state *martial law* as having any place *whatever* within the " realm of *Great Britain.*"

occasion to the general welfare, the military body could never be left for a moment, it should seem, as a free agent, or without a constant and strict restraint. Yet a little and loose attention, of a very desultory kind, is all that had ever been exhibited in the formation of the ancient military ordinances, which were afterwards handed down without much visible attempt to improve them, in a rude, unwrought, and unconsolidated shape, from one generation of sovereigns to another.

The law military, whatever might have been its range in older times, is now restricted in its obligatory force to the definition and declaration of the duties of soldiers, and the enforcement of them, under appropriate penalties. It is now no longer an arbitrary law, originating in the sole will of the reigning prince, continued only during his pleasure, and applicable to an association of men drawn together, and dismissed by the like will, and the like exercise of power; but a digested code of regulations, deliberatively made, considered and confirmed by the common legislative authority of the realm, and published for the observance of a body known to the constitution, created and sustained, like every other executive organ of the State. But it acquired not this consistency and perfection all at once. In the legitimation, if it may be so termed, of the army, by the admission of it among the established, constitutional, and executive bodies, a new care sprung up along with it, which pressed itself on the immediate consideration of the legislature, to provide for its growing wants; and hence followed, in a naturally consecutive, but gradual course, a congeries of legislative regulations, forming the law military, as it stands at this day; comprising a body of necessary, wholesome, and tried rules, for the discipline, order, and government of the military state. Such, however, was the long and intimate connexion of the national armies with the Crown, and so neces-

sary the weight and strength of the royal prerogative has at all times been found, to the direction and restraint of the conduct of the military body, that it has been always, and is now, fraught with a concurrent legislative authority, for framing obligatory regulations in certain cases for the government of the army, independent for a long time, if not now independent, of the other branches of the legislature.

The greatest moderation has been discovered by parliament in the use of its legislative faculty in the affairs of the army; and wherever and whenever it has been exercised, it has evinced a deference to the pre-existing power of the Crown. Its interference, it may be said, has been slow, considerate, and sparing, and has not at any time had the appearance of a clashing of rival authorities, but a silent sharing with the Crown of a common right for the common benefit; an unostentatious assumption and enjoyment of what lawfully belonged to itself, without molesting or touching the royal interests combined with it. The event has been the supercession, rather than the positive abrogation of the high military prerogative of the Crown, in the sole making and declaration of the law for the higher description of military offences—a result not of any adverse conflict, but of agreement or consent between the parties interested.

The first interposition of parliamentary authority in legislating for the army occurred shortlyafter the Revolution, which was of a very partial nature. It related to, and extended not beyond a particular though a complicate case, which then engaged the attention of the country and its legislature, the mutiny and desertion, as it has been shewn, of a part of the Scottish regiments in *Suffolk*. A statute was devised and passed thereupon, for remedy of the existing evils, and directed against the specific offences that occasioned them, "mutiny, sedition, and desertion." This statute

declared the offences specified in the act to be capital, and empowered his majesty to erect courts-martial for the trial of persons thereof accused; but left all other military offences to the redress of the same power, which they previously acknowledged. This act, the 1st of *William* and *Mary*, was then known under the denomination of the *mutiny act*—a description, which has been invariably applied to the subsequent enactments, which have been made for the observance of the army.

As an occasion will hereafter arise, for a more special consideration of the variations and changes which the mutiny act has undergone (for it may be viewed rather as one improved and amplified act, than as a compilation of separate successive acts a specification of them is not required in this place), in order to trace the enlargement of the legislative jurisdiction which it assumes, from time to time, over military crimes, until it places the whole circle of the higher military offences under one and the same dominion. At the commencement of the reign of *Queen Anne*, the mutiny act had made a large stride towards a general jurisdiction, not only in primary but in secondary acts of crime; so as to leave little that is essential to complete the exercise of the ordinary legislative power over the entire list of offences, peculiar to the military state.

The progress from the more confined, to the more enlarged exercise of the right of legislation, does not appear to have been seriously resisted, or noticed any further, on the behalf of the Crown, than an occasional saving of its right, "to make articles of war," from the operation of the acts from time to time made; as in the *first* of *Anne*, and later acts of the same reign. This reservation, however, was omitted in the first year of the ensuing reign; and the right of the Crown, to make articles for the government of the forces, was formally recognised, or, more properly speak-

ing, allowed; the footing on which it has stood ever since, under the authority of the statute.

The law military must be henceforward understood to be virtually derived, notwithstanding the power of the Crown to declare the law, and to denounce punishment of its sole authority against offences, not specified in the Mutiny Act, from one and the same source. It presents not any longer an anomalous exception in legislation—a divided and possibly a distracted authority, scattered and parcelled out in greater or less proportions ,to this or that organ of the State, or to be exercised at one time by one hand, and at another by another—liable consequently to caprice in its guidance or direction; but a regular, uniform, and single power, issuing from one grand spring, though flowing through several communicating channels, to those who are to be refreshed or revived by its streams. From this time the law military owes its force and obligation, like every other legitimate branch of the law, to the potent, or, as it is sometimes termed, the omnipotent authority of parliament; differing, however, in so much from the quality of the ordinary law, that though defined in its marked and leading character by the legislative estates conjointly, its particular features are allowed in all cases to be filled up, so that they consist with the original character, by a single member of the legislature; the most eminent, it is true, in position, but co-ordinate in degree; to whom it is also confided, in some respects, to give the general tone, as well as the particular quality, to the law.

The military state receives its laws, as it has been observed, but in a rude and unpolished form, nevertheless with all their rough intrinsic value, in the first instance, from parliament; through the medium of an annual statute, the Mutiny Act: which laws are afterwards shaped or modelled by the Crown, perhaps from its greater skill, from greater habitude in the science of military legislation, or possibly from a

desire to render the whole military regulations of one workmanship or texture, into particular articles of war; wherein the general legislative provisions of parliament are set forth with all necessary specifications, and the whole reduced and classed under distinct and proper heads. But such articles must be conformable, when the punishment, which they involve, extends to life or limb, to the strict letter of the original parliamentary provision, on which they are founded, or they will be of no legal effect: for in the Mutiny Act it is expressly laid down, that no person shall by such articles of war be subjected to any punishment extending to life or limb, "for any crime which is not expressed to be so "punishable by this act; nor for such crimes as are expressed "to be so punishable, in any manner, or under any regula-"tions, which shall not accord with the provisions of this "act*."

A part of the military laws, of less importance, in a legislative view, is immediately declared, but still under the authority and superintendence of the legislature, by the single will of the Crown: these relate either to the minor species of military offences, not falling within the attention of the legislature, and therefore not provided for in the Mutiny Act, or to others of a secondary concern, not set forth in the clauses of such act, with sufficient certainty or precision.

With respect to that part of the military law, derived from the sole authority of the Crown, operating on the minor order of military crimes, it is unlimited as to the offences on which it acts, but restricted by a condition, a solitary one, in regard to the safety of the offender; that he shall not be subjected thereby to any punishment affecting life or limb.

In describing the power of the Crown, in this place to make and declare arricles of war, it is regarded only in its

* 38th Clause of the Mutiny Act, 1815.

exercise within the realm, and not as it may be employed in framing rules and regulations for the government of his majesty's armies in foreign territories: for, in the latter places, the authority of the king, in making such rules or articles, as new or local circumstances or situations demand, and affixing such punishments to them as they may require, though the punishments should extend even to life or limb, is altogether without limitation or control; the clause of restraint in the Mutiny Act*, referring solely to articles, that may award *punishment* to offences, to be inflicted "within "the United Kingdom of *Great Britain* and *Ireland, Jersey,* "*Guernsey, Alderney, Sark* or *Man,* or any of the islands thereto belonging." Were it otherwise, many crimes of enormous guilt, not specified, and, in some instances, incapable of specification, in the Mutiny Act, would go without any suitable punishment; all such, certainly, that should originate out of accidental or local circumstances, which often require to be checked, in the state of war, by prompt and present means.

It is to be noticed once more, that the provisions of the law, or any part thereof, in respect to certain declared and described crimes in the Mutiny Act, cannot be varied or altered by the Crown, from the mere circumstance of the offences, to which they relate, being committed without the precincts of the realm. These provisions are fixed, and the articles of war must be in substance, if not in form, in conformity with them. The first clause of the Mutiny Act, declaring the great body of capital offences, is sufficiently clear on this head—enacting, "that all and every person and per-"sons so offending in any of the matters before mentioned "(constituting the principal military crimes), whether such "offence shall be committed within this realm, or in any other

* 37th Clause of the Mutiny Act, 1815.

"of his majesty's dominions, or in foreign parts, upon land, or "upon the sea, shall suffer death, or such other punishment as "by a court martial shall be awarded." It is impossible to overlook the fact, in the foregoing declaration, that the operation of the act, as to the crimes which it describes, and the persons to whom it relates, has force here, and every where else. But it is as plain in principle as in statement, or the king might annul an act, solemnly made, in conjunction with the other estates, at his sole pleasure—superseding, of himself, the joint legislative power.

The Mutiny Act, and articles of war, may therefore be said to constitute the whole, or nearly the whole of the military code; lending and receiving aid, each in their turn, from the other. The first may be considered the substratum, the second the superstructure of the legal fabric, for the protection of the military state, and the interests communicating with it. They together contain all the salutary regulations that are deemed essentially necessary to keep the military body in due health, and to guard, in a season or condition of contagious distemper, the spread or communion of the temporary influence, which it may itself feel, to the world around it. To these may be added, if not another source of substantive and positive law, an acknowledged help or aid, in the interpretation or illustration of it, namely, the usages and customs of war, which are directed by the oath dictated by the legislature to all the members of courts-martial, to be called in as a fit assistance or ally, "if any "doubt shall arise which is not explained by the articles or "act of parliament," to the conscience and understanding of the court.

In describing the necessity that there is for separate laws for the government of the national army, as it is now constituted, the principle on which they proceed, and the extent to which they reach, it is fortunate that I am not compelled

to rely on any notions and impressions of my own. A most learned and venerable authority* has expressed itself distinctly and with singular clearness, on every one of these heads, of which I most gladly avail myself.

"By the providence and wisdom of parliament (he observes), an army is established in this country, which it is
" necessary to keep up; the establishment being fixed by
" the authority of the legislature. It is an indispensable
" requisite of the establishment of an army, that there should
" be order and discipline kept up in that army, and that the
" persons who compose it should, for all offences in their
" military capacity, be subject to a trial by their officers.
" This has induced the absolute necessity of a *Mutiny Act*
" accompanying the army; and it has happened at different
" periods of the government, that there has been strong op-
" position to the establishment of the army: but the army
" being established and voted, that led to the establishment
" of a Mutiny Act. It is one object of that act to provide
" for the army; but there is a much greater cause for the
" existence of a Mutiny Act, and that is, the preservation of
" the peace and safety of the kingdom: for there is nothing
" so dangerous to the civil establishment of a state, as a li-
" centious and undisciplined army. The object of the
" Mutiny Act, therefore, is to create a court invested with
" authority to try those who are a part of the army, in all
" their different descriptions; and the object of the trial is
" limited to *breaches* of *military duty*. Even that extensive
" power, granted by the legislature to his majesty to make
" articles of war, is limited to the making of articles for the
" better government of his forces, and they can extend to no
" other cases than such as are thought necessary for the

* The *Earl* of *Rosslyn*, in giving judgment in the case of *Serjeant Grant*, in Trinity Term, 1792.

" regularity and due composition of the army. Breaches of
" military duty are in many instances strictly defined, in all
" cases where a capital punishment is to be inflicted. In
" other instances, where the degree of offence may vary
" exceedingly, it may be necessary to give discretion with
" regard to the punishment; and in some cases it is impos-
" sible more strictly to mark the crime, than to call it a
" neglect of discipline."

This concise but lucid account of the law military, and the reasons on which it is founded, will answer the present demand, if it will not altogether satisfy the duty required of him, who professes to speak more distinctly on the subject.

The Mutiny Act and the Articles of War, are mentioned by the Chief Justice of the common pleas, as the known sources, whence the law military is derived. If any other existed, the keen eye of this most shrewd and eminent lawyer would have descried it, as the discovery of it was closely allied with his direct and immediate business. As none other has been alluded to, one would have been inclined to conclude, that none existed, except what has been remarked by an ingenious author, also of great professional learning, should have a tendency to shake such conclusion. It is suggested in the essay on military law*, that crimes may be declared and punished by regulations of the Crown, made apart from the Articles of War. After stating that no crimes, against which any express provision is made in the Articles of War, shall be subject to any punishment than therein provided; and that no penalty shall be inflicted by any Article of War, contrary to the intent and spirit of the Mutiny Act; the author proceeds—" Although it follows from these clauses, that no
" crime which is mentioned and defined by the Articles of

* *Tytler*, page 107.

" War, is punishable by a court martial in any other manner
" than is specially directed by those Articles; yet it does not
" follow, that there are no crimes punishable by a court mar-
" tial, but such as are enumerated and declared to be punish-
" able by the Articles of War. For it is in the power of his ma-
" jesty at all times to make and issue regulations for the army,
" independent of those made by the Articles of War, and
" such regulations have all the binding force of military law."

Giving an entire assent to the proposition, that the Crown has full and competent power of itself to issue regulations for the government of the army, yet I cannot go all the way with the learned author, to the conclusion drawn by him, that such regulations have therefore all the binding force of military law.

The Mutiny Act, it must be admitted, empowers the king to make Articles of War, and declares those Articles to have the effect of law; but it does not say that any thing less than such Articles, formally made, shall have that force. All courts are bound to take cognizance of the Articles of War, and in order to bring them within the knowledge of the civil or common law courts, it is directed by the Mutiny Act, that copies of such Articles, " printed by the king's printer,
" shall from time to time, as soon as conveniently may be
" after the same shall be made and established by his ma-
" jesty, be transmitted by his majesty's secretary at war, signed
" with his own hand and name, to the judges of his majesty's
" supreme courts at *Westminster*, *Dublin*, and *Edinburgh*,
" &c. &c."

Thus it seems, that the Articles of War are attended with a solemnity and credit, which are wanting to the regulations, for the purpose of rendering them public, and of restraining, if necessary, through the intervention of the superior courts, any acts of excess in persons professing to act under them.

Besides, the oath, administered to the members of a court martial, binds the court to decide according to the Articles of War and the Mutiny Act, but is silent as to the *regulations* —so that there is nothing obligatory on the conscience of the court martial to govern their decision according thereto. This would seem equally decisive of the inferiority of such regulations to the Articles of War, as the defect of their authority as law.

What, then, it may be asked, is the effect of these regulations, if they be deprived of the character claimed for them? Are they consequently of no avail? It may be promptly answered, that they are entitled to the same respect with all orders issuing from a lawful superior, within the known province of his power. The king, as generalissimo of the national force, has the supreme rule of the army, in all that respects its conduct, its order, and its discipline. His majesty may, therefore, in such his relation, signify his commands to the army, in whatever shape he may think fit, and they demand implicit obedience from all to whom they are directed, and in all things to which they relate.

In matters appertaining to the interior arrangement or economy of the army, from the circumstance of his high control, and superintending care over the military state, the king possesses a peculiar, if not exclusive power. Both the larger and the lesser authority, whether applying to the general affairs or the particular economy of the army, is communicable by the Crown, at its pleasure, in a limited or unlimited degree, through all the distinctions and gradations of rank, obtaining in the military community; command, in military consideration, being indivisible in its essence. The wide-extending power of the general, and the meanest measure of rule, dealt out to the lowest grade acknowledged in military life, are of the like virtue, and differ only in degree; being both a spark or an emanation of the same

authority, derived immediately or mediately from the Crown.

Thus the orders of the general or commandant of any description to his particular army, or a lesser body of men, has the same force, within its prescribed range, with the orders of the Crown to the army at large; and the orders of the lieutenant-colonel of a regiment, for the economic or domestic management of the corps intrusted to his command, operate in the same way with the orders of his majesty, for the enforcement of the general economy of the army. In both and in all like cases, the orders owe their authoritative quality to the circumstance of military command, distinct from the circumstance of legislation.

Such commands, published under one name or another, whether of orders of a temporary nature, or of regulations of more stability, do not, it is presumed, on that account *alone*, challenge the same attention with the provisions of the military law, as contained in the Mutiny Act or Articles of War. If orders from all these various branches of command, and touching all the variety of matter to which they may relate, were entitled to the consideration of military law, what volume would be large enough to contain them? What mind sufficiently comprehensive to embrace so heterogeneous a mass of matter? Such orders may come, it is true, within the view, and in some instances within the cognizance of a court-martial, and the court is bound to take notice of them; but whenever they so come before it, it must be in an incidental and not direct manner. The court can never be desired to take notice of them as general laws; but they may be laid before it as evidence, when properly substantiated, of particular commands, binding, from circumstances shewn, on the party on whom they were imposed. The court, in considering any instance of the breach of such orders or regulations, will have to regard it not as a breach of military law, enjoined by

the orders or regulations of themselves; but as a violation of military duty, enforced in every page and line of the Articles of War; which require a strict obedience, the vital principle in the military constitution, to the lawful commands of a superior. The relevancy or lawfulness of such commands may in every case be examinable by the court. Not so the law military; for *that*—MUST be OBEYED, and without question.

All these considerations would lead one to suppose, that the author has ascribed a virtue to the regulations in question, which, on inquiry, they would not seem to possess. If so, the law military will be found to stand on the pure and simple footing explained by the eminent legal authority, whose definition I have adopted, and which would appear to be correct.

Having shewn generally, what the law military is, and whence it springs, I shall next endeavour to trace the peculiar provisions, which it contains, with the manner of enforcing them. These are to be collected, from the Mutiny Act and Articles of War—of which, the better to discover their respective qualities, I shall endeavour to give a distinct account; proceeding first with the Mutiny Act.

CHAPTER VI.

Of the Mutiny Act.

THE Mutiny Act is not a standing, but an ambulatory act, passed from time to time, at the discretion of the legislature, subject to such alterations and amendments as circumstances may require, for the government of the national forces. While the latter were raised, at the will of the Crown, and for particular warlike exigencies, and disbanded, when such exigencies ceased, the regulations for the government of forces, partaking of the quality of the army, ceased along with them. The necessity of some more formal and statutory provision was felt, as the army began to assume somewhat of the shape of an established body. The military state is not so far admitted in *principle*, at this day, as to be holden as a *permanent* establishment; though it has been retained and kept up, in *practice*, without intermission, for more than a century.

A *standing* army, notwithstanding the long-subsisting custom of maintaining a number of regular troops in pay, would seem, at first sight, to contradict the assertion, which has been often made, that it is a thing unknown to the constitution. In point of fact, a trained and disciplined force has been maintained without interruption since the Revolution; yet that alone, looking to the circumstances under which it has been retained, will not give it the quality of a *standing army*; in as much as it has been voted from year to year, or other prescribed period, at the will of the legislature, governed by the state and necessity of things; and might at any interval

have been disbanded, in its anterior career, as in its further progress, by the declaration of parliament. The natural existence of the army, then, is but from one session of parliament to another, though its permitted political existence may have chanced to reach, under a peculiar state of things, as in the case before us, one hundred and twenty-five years, and more.

The forces, which are considered to be sufficient for the defence of the country, for the maintenance of our territorial possessions abroad, and of our political consequence among neighbouring States, varying according to circumstances, are voted annually by parliament; and a yearly statute, under the denomination of the *Mutiny Act*, conforming to the condition of the military body, is passed by the same authority, for the government of such forces.

The Mutiny Act, from its first enactment to the present date, has proceeded on a general declaration "that the raising or keeping a standing army, within the kingdom, in time of peace, "unless with consent of parliament, is against law." It has afterwards usually set forth the inducement or necessity for the particular vote of troops as in the first of *William* and *Mary*, which begins with a recital, "and whereas it is judged "necessary, that during this *time* of *danger* *, several of the "forces, which are now on foot, should be continued and "others raised for the *safety* of the *kingdom*, for the common "*defence* of the *Protestant Religion* and for *reducing* of "*Ireland*."

As the circumstances, demanding the supply, or maintenance of a regular body of troops, have varied, so the reasons assigned in the preamble to the Mutiny Act, arising out of such circumstances, have been varied according to facts. It is not necessary to follow out these particular variations. It

* From a threatened invasion from *France*.

is enough to remark, that at the commencement of the present reign* a more general mode of assigning the reasons for calling forth the force required, was introduced, which has been since used almost as a set form. It is to this effect—"Whereas it is judged necessary by his majesty and "this present parliament, that a body of forces should be continued for the safety of this kingdom, for the defence of the "possessions of the crown of *Great Britain*, and the preservation of the *balance* of *power* in *Europe*."

For three or four memorable and eventful years †, under an impression, and happily an erroneous one, that the balance of power had been destroyed, beyond the reasonable hope of restoration—the concluding branch of the sentence, "the *preservation* of the *balance* of *power*," had been omitted to be avowed as one of the leading causes for the keeping up a regular army. It has since resumed the place which it had lost ‡. It holds out not only a legitimate reason for maintaining a national army on foot, but is an object of civil as well as military policy, which never should be out of sight.

The adoption of a more general form, in setting forth the reasons for sustaining a regular army, is not to be taken to infer or to insinuate that the grant of any force, be it what it may, on the requisition of the Crown, is a matter of routine, but rather an admission on the part of parliament, of the necessity of such an establishment, from the relation of other States. In the very act, where this form is first introduced, so far from shewing any carelessness as to the granting of the numbers demanded, an excuse is required, at least it is offered, for keeping up a force beyond sea, exceeding the numbers mentioned in the act, with a stipulation that it shall be broken and reduced, as soon as it can be conveniently

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* 4th *George* the *Third*. † From March, 1812 to 1815.

‡ In the Mutiny Act of 1815.

done, after its arrival in *England**. At this time too, and thenceforward, a specification is made of the *exact numbers* required and granted; the only circumstance wanting to give full effect to the provisions in the declaration of rights.

If the Mutiny Act has varied in some particulars, it has been invariable and uniform at least in these; in asserting the general principles, that "No man can be forejudged of "life or limb, or subjected to any kind of punishment within "this realm, by martial law, or in any other manner than by "the judgment of his peers, and according to the known and "established laws of this realm." And in declaring, also, the exception to the principle, as in the case of soldiers, to rest on the indispensable ground of necessity; or in the words of the act: "Yet, nevertheless, it being requisite for the re-"taining of all the before-mentioned forces in their duty, that "an exact discipline be observed, and that soldiers who shall "mutiny or stir up sedition, &c. &c. be brought to a more ex-"emplary and speedy punishment, than the usual forms of "the law will allow, be it therefore enacted, &c. &c." The preamble, having thus stated the universal principle, and the particular reservation or exception to it, the statute proceeds to enact the especial provisions for the regulation of the military state, in its distinct character

In every Mutiny Act, from the 1st of *William* and *Mary* to the 55th of the *King*, it is expressly declared, that the subject, generally, is exempt and wholly free from the operation of martial law, and of the judgment of any other than his peers, under the known and established laws of the realm; and that in the matters, in which the act is about to alter the condition of the soldier from that of an ordinary citizen, it goes entirely on the ground of enforcing the *military* duties and an exact discipline, and of punishing in a

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* In the year 1763, at the conclusion of the war with *France* and *Spain*.

more summary way, than the common law authorizes, the peculiar offences of soldiers.

The Mutiny Act, from what has been immediately observed of it, must be taken therefore to declare the policy, and the provisions of the military law of *England*, as affecting the members of the military state. It contains a digested code of regulations, enacted by the legislature, for the observance and government of soldiers, in all their various relations to one another, and under all the circumstances of obedience and command. It protects or seeks to protect the military state, through the means of suitable sanctions, awarded against offences, having a direct tendency to impair the command of the military body, to disturb its internal order, to weaken its union, to endanger its safety, to affect its discipline, or to destroy its subordination. It enforces the positive duties of soldiers, as members of such state; by denouncing punishment against the neglect of them—It also sustains the moral feeling of the soldier, and the moral character of the body to which he belongs, by imposing penalties, which, if they do not excite an inclination to rectitude, restrain the impulse to crime, on *immoralities* and *misbehaviour*. It establishes an especial tribunal for the trial of military offences, and for the administration of military justice; whereby the soldier is preserved, in matters connected with his interests, his rights, or his injuries, from the misinformation or ignorance of judges, strangers to the customs, usages, and *habits* of his life; which are often illustrative, if not always indispensable to the proper understanding of the military law.

The legislative regulations (that are now to be found in the Mutiny Act, bearing on these multifarious and important heads) are the result of several legislative efforts, though incorporated in one statute. Many of them, though referring to one subject, have been made at long intervals from one

another, and others, single in their relation, but numerous in the objects which they regard, have been introduced by degrees; as the wants and necessities of the military state came to be better defined and ascertained.

The first Mutiny Act, being made on the spur of the occasion, legislated only in the offences of *mutiny* and *desertion*, and in the *creation* of a *court* for the trial of *those offences*, and no other. Military offences, indescribed in the Act, were left to be punished, as before, by the ordinances or Articles of War occasionally made by the Crown.

The 1st of *William* and *Mary* was to have effect only for a few months, from the 12th of April to the 10th of November, 1689.—The succeeding Mutiny Acts of the same reign, carry the parliamentary jurisdiction over military offences very little further.

It is remarkable, that there is no entry in the statute book of any Mutiny Act from 20th December, 1691, to March 1692, the 8th and 9th to the 13th of *William* the *Third;* and from the 12th to the 13th of *Anne*, the only instances of the intermittance of this *annual* act, as it is generally described, from the first passing of it to the present date.

In the *first* of *Queen Anne*, a very general legislative jurisdiction was apparently exercised by parliament over military crimes; among which, in addition to those already named, over the following capital and inferior offences:—

1. For enlisting a second time, without a previous discharge; holding correspondence with a rebel or enemy; disobedience to a superior officer—and striking or drawing upon him.

2. For false musters—improper quartering of men—stoppage of soldiers' pay—and forcing carriages for the conveyance of baggage and stores.

Towards the end of the reign of *George* the *Second*, nearly the whole mass of the offences, of which officers or

privates might be guilty, is embraced by the Mutiny Act; not, perhaps, so distinctly or precisely as at this day, but enough to shew that the legislature had the intention of exercising, and were actually exercising, a full and general authority therein.

In the present reign, when a large military force has been almost constantly kept on foot, great opportunities have been afforded for observing the peculiar character, the manners and habits of those attached to the military state, and the consequence of this better acquaintance with the military condition, and a more continued view of the regulations, in operation on, or in application to it, has been the introduction of new penal enactments, where they were perceived to be wanting, and the amendment of the subsisting provisions, wherein they appeared to be incomplete or indistinct, either in their object, or the means of accomplishing it. The attention of the legislature, directed in continuity, from year to year, to this most desirable end, has at length given, not an entire perfection, perhaps, to the law military, but so much form and consistency, as to remove a great part of the reproach which had been cast upon it, and not without some reason, on account of its arbitrary spirit, and the uncertainty of its letter.

Many material alterations have been made in the Mutiny Act in the present reign; more particularly regarding the enlistment and desertion of soldiers—the false mustering of troops and horses—the embezzlement of public stores, arms, clothes, provisions of men, or horses—and the detention of officers' or soldiers' pay. A consideration of the public interests has co-operated with the military policy, in the whole of these instances, in providing with a more than ordinary caution and vigilance against offences, which concern in some, if not an equal degree, the common good, with the well-being of the military state.

In other cases the Mutiny Act has extended and vigorously enforced its provisions against offences in officers or soldiers, that infringe on the liberties or rights of the subject, in respect to the unlawful quartering of troops on the persons liable to entertain them; the illegal pressing or use of private waggons, for the carriage or conveyance of troops and stores; and the abuse of the power in enlisting or retaining persons, such as apprentices, who are not *sui juris*, and therefore without the ability to dispose of themselves.

It would be an injustice to the legislature not to remark, that its pains have not been less conspicuous in providing for the welfare and happiness of the military state, self-considered, than it has been anxious for the protection of those interests, which are related with it. Such pains have been eminently manifested, during the time it has exercised a legislative authority over military matters, in securing to the soldier a fair and impartial administration of the benefits of the military law, through a regular and well-organized tribunal; without which, the law itself, however perfect, might have remained to them an inoperative letter. This was shewn in the appointment of a number of judges, of mixed rank and degrees, not permanently fixed, but to be assembled, as occasion should demand; by the prescription of an oath to such judges, in the trial, in the first place, of the flagrant offences of *mutiny* and *desertion* *; next in the trial of *all* CAPITAL CRIMES †; and then in all matters of crime whatever, that could possibly fall within the cognizance of a *general* court martial; and lastly, to the members of *every* military court, however limited its jurisdiction ‡. It has also been evidenced, in compelling and protecting,

* First of *William* and *Mary*.

† First of *George* the *First*.

‡ By the 45th *George* the *Third*, it is first provided, that an oath shall be administered to the members of *regimental* courts martial.

under the penalties of the common law, the attendance of witnesses on courts martial; and in making provision, under the like penalties, for the punishment of perjury committed in the face of such courts—in ordering a registry of all pleadings and proceedings in courts martial, and copies of them to be furnished to those interested therein, on a proper application, without the expense of stamp-duties, attaching or incident to the copies of pleadings of the ordinary courts of law.

Beyond the regulations, just particularized, affecting, in a criminal manner, the military body alone, the Mutiny Act contains provisions of statutory obligation on the common subjects of the realm, in matters having relation to military transactions and arrangements, as connected in some degree with the actions or conduct of soldiers. Though these provisions are found in company with those, respecting soldiers peculiarly, as comprised in the Mutiny Act, they have not from the locality, where they are discovered, any of the peculiar quality of the law military about them—but are to be regarded, in respect to the persons to whom they apply, as civil, not military constitutions; the rights or remedies to which they relate, being not protected, nor to be pursued through a military, but a civil court. The provisions, therefore, having respect to them, would not seem to fall within the province of the present inquiry; which is bounded by a narrow fence, and is confined to the investigation of those rules and restraints, and the principles on which they proceed, as they touch the military community.

In speaking hitherto somewhat generally of the law military, as purely referable to soldiers, and as it is to be collected from the Mutiny Act, or of the amendments and alterations, which, according to the pleasure of the legislature it has undergone, I have been governed by the desire of reserving the observations, that occur to me, on considering

the separate regulations of which it is composed, for a subsequent place, where they will flow, apparently, more in order; following also, in this respect, if not the principle, the example of the Mutiny Act, which marks out the great features of the military law, trusting in some measure to the office of the Articles of War, which the Crown is authorized to make, to fill up the general outline, by which it may be distinguished in itself, and known familiarly of those to whom it applies. An inference might be drawn from the latter circumstance, that the Mutiny Act, taken substantively, does not set forth with accuracy or precision, the crimes which it intends to denounce, or the punishments which it designs to award to them. But we have the authority of a very learned judge*, in stating, "that the breaches of military duty," (as described in that Act) "are in many instances "*strictly* defined; and in *all* cases, where a *capital* punish- "ment is to be inflicted."—And the *Chief Justice* of the *Common Pleas* continues—"In *other* instances, where the offence "may vary exceedingly, it may be necessary to give discretion "with regard to the punishment; and in *some* cases it is im- "possible more strictly to mark the crime, than to call it a "*neglect* of *duty*." It may be repeated here, which would weaken such an inference still further, that though a general power be delegated to the Crown, to make and declare Articles of War, for the better government of the forces, it is limited with the greatest strictness, in respect to those articles which it may be advised to make, touching such offences as are specified in the Mutiny Act, involving, in the punishment assigned to them, the loss of life or limb. The Crown, in making Articles of War in these cases, is bound to see, as has been above explained, that they conform not to the spi-

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* The *Earl of Rosslyn*, in giving judgment in the case of the King against *Grant*, in the Court of Common Pleas.—*Henry Blackstone's Reports.*

rit only, but to the very letter of the Mutiny Act: so that the Act must be supposed to have a substantive character, in defining such offences, and their correspondent punishments: And in any other case of a capital nature, not specified in the Mutiny Act, the Crown is excluded from the operation of the clause of limitation* in the Act, from making Articles of War in relation thereto, when such case may occur within the United Kingdom of *Great Britain* and *Ireland*, or any of the isles thereto belonging. But in foreign countries, where there is no legislative power present, the Crown, of its prerogative, has authority, it should seem, to make Articles of War in all cases, unprovided for by the act, whether they involve a capital punishment or not.

The Mutiny Act, in describing what offences are capital, within the United Kingdom, and isles adjacent; and ordaining that no others shall be considered as such; and that no other punishment shall be awarded against them, than is described in the body of the act; necessarily restricts the Crown, in framing Articles of War, having reference to such offences, to the mere detail or specification of the principal military crimes and their appropriate punishments, without allowing to it any original jurisdiction therein; except, perhaps, it may consist in the authority of directing a specific penalty in any particular offence, in the stead of the general discretionary sentence allowed by the Act, in lieu of the heaviest human punishment, to which this class of offences, without distinction, is rendered liable. The higher penalties and sanctions of the law military stand otherwise, of themselves, on the foundation of the Mutiny Act. In these cases, it is therefore clear, that the Mutiny Act is not in need of, and can receive little, if any aid, from the Articles of War.

The offences of this higher description are few, and are

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* The 38th clause of the Mutiny Act, of the 55th of the king, 1815.

in general not indistinctly described in the Mutiny Act; as well as the punishment, to which they are all alike, in the first instance, aggregately and severally subject; but which may be mitigated, in any and every case, at the discretion of the court-martial.

The offences, in officers and soldiers, to all of which the punishment of death is indiscriminately adjudicable by the Mutiny Act, are as follow:—

1st. Who shall begin, excite, cause, or join in any mutiny or sedition in his majesty's land or marine forces; 2d, or who shall not use his utmost endeavours to suppress the same; or coming to the knowledge of any mutiny or intended mutiny, shall not, without delay, give information thereof to his commanding officer; 3d, or shall misbehave himself before the enemy; 4th, or shall shamefully abandon or deliver up any garrison, fortress, post, or guard committed to his charge, or which he shall be commanded to defend; 5th, or shall compel the governor, or commanding officer of any garrison, fortress, or post, to deliver it up to the enemy, or to abandon the same; 6th, or shall speak words, or use any other means, to induce such governor or commanding officer or others, to misbehave before the enemy, or shamefully to abandon, or deliver up any garrison, fortress, post, or guard, committed to their respective charge, or which he or they shall be commanded to defend; 7th, or shall leave his post before relieved; 8th, or shall be found sleeping on his post; 9th, or shall hold correspondence with, or give advice or intelligence to any rebel or enemy of his majesty, either by letter, messages, signs, or tokens, in any manner or way whatsoever; 10th, or shall treat or enter into any terms with such rebel or enemy, without his majesty's licence, or licence of the general or chief commander; 11th, or shall strike, or use any violence against his superior officer, being in the execution of his office: 12th, or shall disobey any lawful com-

mand of his superior officer; 13th, or lastly, who shall desert his majesty's service. All these offences would appear to be perspicuously, though succinctly described; and although they may present so many subjects, as there are offences, for separate Articles of War, it would not seem that they would demand any very material illustration therefrom. Much of the precision, in the definition and declaration of these offences, is the work of the legislature, within the present reign, and in some cases, after great deliberation and debate.

If the code, having reference to graver crimes, be not yet perfect, it may be said, that there is but one offence, embraced by it, of which the mind cannot form a complete and distinct idea, at the very first glance. But as this with others will be spoken of more particularly in the next chapter, it is sufficient merely to hint at it thus generally here.

Of the minor or inferior offences, the Mutiny Act is not always so clearly declarative; it is generally, however, if not always so, in those offences where any injury of the private subject may be effected through the offence of the soldier. This may be asserted particularly of those clauses in the Act, that relate to abuses in the quartering of soldiers, in the impressment of waggons or wains for the public service, and the enlistment of persons, as soldiers, in whom others have a paramount temporary interest. It may also be said of the clauses, denouncing a penalty against officers, not through the decision of a court martial, but by an unusual course; as in the instance, among others, of officers quartering soldiers in a manner, unauthorized by the Mutiny Act, or using any menace or compulsion to mayors, constables, or other civil officers: and again in other cases, where, though the offence be declared by the Mutiny Act, the prosecution thereof is left to the hand of the common law, as in the case of perjury,

committed in any of the oaths or affidavits required by the Act; and of persons making false representations for the purpose of obtaining bounty, and other like cases.

There is no attempt, it is true, in the Mutiny Act, even to describe a vast body of offences, that may call for the sentence of a court martial; which are designated therein, by no other than the general and very indeterminate description of "Immoralities, misbehaviour, or neglect of duty;" to be expiated by imprisonment, or corporal punishment, not extending to life or limb.

It is observable, that although the crimes are not precisely described, that the mode, if not the quantum of punishment adjudicable to them, is plainly pointed out. The penalty, consequent on the conviction of the military crimes, here referred to, is as clearly set forth, as on those convictions at common law, where the sentence of imprisonment and corporal chastisement is left, as it is in many cases, of necessity, to the breast of the judge. This, in both instances, must be governed by a sound discretion in the court, under the necessary restraint of law.

Some might wish, if it were practicable, that the latter description of offences of officers and soldiers, punishable under the Mutiny Act, were set forth in certain cases with more precision; lest it should be imagined that they are not deserving of specification, and if so, not fit objects of punishment. It might be injurious to have it understood, that they are of so unimportant a nature, to be beneath the attention of the law, so as to come under the well-known maxim, "*De minimis, non curat Lex.*" It is not, it may be said, the smallness or diminutiveness of the crimes themselves, but their subtlety and range, precluding an accurate description of them, if not preventing the mind from comprehending them at once in its grasp, that cause them to remain undescribed. But there is no mind, however blind, or narrowed

by prejudice, that cannot instantly perceive that the *immoralities* of soldiers, if they have not the effect of directly injuring, like positive and declared crimes, the well-being of the military state, have a tendency, nevertheless, in *all* cases to taint and corrupt the very foundation of the military body, by undermining the principle on which it rests, and, in *some*, to prostrate or weaken its physical strength, and therefore to be guarded against by a prudent and provident legislature. These arise, however, out of so many sources, shew themselves in so many forms, are dangerous in so many degrees, and are to be put down by such diversified means, from the peculiarity of attendant circumstances, that it is not often possible to provide a legal remedy for them, until they *arise*, or perhaps in any instance, a *standing* one.

Some of them, it may also be observed, may be of such a nature, as not to be named at all; others, not safe to be mentioned, for fear of the imitation, that might be excited by the bare circumstance of the known existence of the vicious habits or propensities involved in them. It is, therefore, that the legislature may have forborne from legislating specifically in such cases, thinking that less mischief might be produced to the military body by leaving them indescribed, and liable on that account to be, in some instances, misconceived, than that they should be minutely traced, in all their grossness and deformity, where the description might pollute, rather than deter or reform, though it should be accompanied by the declaration of a serious penalty. But there can be little fear, that such immoralities, as are objects of reprehension, in a legal consideration, can be often misinterpreted, since they must be public in their practice, injurious in their nature, contagious in their influence, or disqualifying in their effect, in preventing the due performance of the military duties by the person who may chance to be guilty of them.

Under the general term *immoralities*, as in the contem-

plation of the legislature in this place, are not meant to be included those vicious practices which are privately and secretly committed, so as to offend not the public eye; nor those of so slight or trivial a nature, as to be unworthy a solemn investigation; but such only, as by the force of their evil example, or other baneful consequences, may injure the military community, and therefore amount to a degree of crime; such as *drunkenness*, *profaneness*, *open* and *notorious lewdness*, *gross indecency*, and others of a like description, practised in the sight or hearing of men. The sense and construction of the common law, in these cases, when it is not otherwise directed, may be taken as the criterion of judgment by those, who have to decide on the immoralities punishable in soldiers.

The general *misbehaviours* and *neglect* of *duty*, contemplated and summarily referred to by the Act, are subject to many, if not all the observations, immediately offered, in respect of the immoralities, to which soldiers are liable. They are of a family too numerous to be reckoned, and of too mixed, too unsettled or changeable a feature, to be in all instances delineated; and must therefore in some, as a matter of necessity, be suffered to remain undefined. It is from their number, as well as their quality, and from their obtruding themselves on the public notice, that they require to be repressed by the vindictive arm of the law.

The misbehaviours and neglects, here alluded to, are not the aberrations from those nice and settled rules, the observance of which are said to constitute *good manners*, or the non-performance of those duties, the fulfilment of which is supposed to characterize *good morals*—but misbehaviours and neglects, in a military sense merely; such as infer a departure from military order or regulation, or a breach of military duty. In order that such misbehaviour or neglect may be checked, by the intervention and operation of the law;

it must be first discovered; and how is this to be effected, from the numberless circumstances and incidents in which they may occur, except by a power having the military body and its affairs constantly under its eye.

The legislature certainly has not the leisure, if it had the will, to watch, in order to punish, all those instances of immorality, misbehaviour, or of neglected duty, ever occurring, and ever varying, that may spring up to endanger the safety of the military state. Where and when might it be expected to gain so thorough a knowledge of the manners and customs of the camp, as to bring them all under one view? When and how to prescribe particular remedies for disorders of so many shapes, and sizes, and variety?

Are these offences, then, not from their insignificance, but on account of their multitude merely, to be suffered to pass with impunity? The legislature, confessing its own inability, to provide a definite remedy in every case, has left, I need not say wisely, but almost indispensably, the definition or specification of the offences themselves, so far as they can be defined or specified, as well as the punishment of them, to the discretion of the commanding and superintending power, peculiarly set over the military body; observing and directing its conformation, renewing and refreshing its constitution, and watching and governing all its actions; and the cognizance of such offences, when they shall be so specified and defined, to general, or general regimental courts martial. When the legislature felt that it could but legislate imperfectly, it has chosen not to legislate at all; but has confided to these powers conjointly to fulfil its known intentions. It has committed, as it were, an equitable jurisdiction over the offences, in question, to the ordinary martial courts, under the control of the Crown. If in any case, or under any circumstances, so large a discretion may be confided to any authorities other than the legislature, it might surely be

intrusted under these safeguards. The trust, with regard to liberty, is a most important one; but justifiable, it should seem, under the caution, which has been taken against the abuse of it.

The effect of this confidence has been,—the fair and substantial administration of criminal justice, for a number of years, in all misdemeanors, or inferior offences, of which soldiers may be accused; and a definition in process of time, from the frequent observation and investigation of the circumstances and qualities of these misdemeanors, by several Articles of War, that the Crown is empowered to make, in which such offences, with all their particularities, are brought into the immediate view of courts martial, so as to direct their judgment therein: so that at this day, there is scarcely any immorality, misbehaviour, or neglect of military duty, that can be the object of punishment, of which the military community and the military courts are not fully and competently informed.

To any objection that may be stated to the uncertainty of the punishment in these lighter offences, it may be replied, that the guilt in most of them may be either aggravated or diminished by the circumstances under which it is incurred, and therefore it is impracticable to lay down a rule, which shall govern in all cases indifferently. But the nature of the punishment, in all of them, if not the extent of it, is specifically described. In this respect, more attention is shewn by the legislature, that the penalties to be incurred in those cases where the crimes are not so expressly marked, shall not exceed the guilt inferred in the crimes respectively; than in the capital and more serious offences, which are more particularly described, where a discretional punishment in the stead of death, is universally left to the decision of the court martial.

Of the Mutiny Act, as descriptive or declarative of those

offences, whether of a primary or a secondary nature, that are cognizable by a court martial, I have taken, perhaps, sufficient notice; or if any material remark has been omitted, I may possibly find a place for the introduction of it, when I come hereafter to treat of the Articles of War severally in their order.

There are certain parts of the Mutiny Act, that respect some military crimes, or the conduct of officers or soldiers, as such, on which that statute is conclusive,—and others that contain regulations, altogether independent of the Articles of War, or the interposition of the military court, which require to be attended to. The provisions, in question, are not many, though of importance.

The first, to be noticed, relates to an offence, of which the commanding officer of a regiment, and every other subordinate officer, may be guilty—in respect to the neglect or refusal of rendering up, any officer, non-commissioned officer, or soldier, under his command, accused of any capital crime, or of any violence, punishable by the known laws of the land, against the person, estate, or property of any of his majesty's subjects, upon proper application for that purpose by the civil magistrate; or the neglect or refusal to aid or assist the civil officers of justice, in apprehending such offenders. The refusal or neglect in either of these cases, is an offence, as declared by the seventeenth clause of the Mutiny Act*, that may be prosecuted by information or indictment in any of his majesty's courts of record at *Westminster*, in *Scotland*, or in *Dublin*; and if any such officer be convicted thereof, he is to be deemed and taken to be *ipso facto* cashiered, and utterly disabled to bear or hold any civil or military office or employment in *Great Britain* or *Ireland*, or elsewhere, in his majesty's service.

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* Mutiny Act for 1815.

This offence is completely within the jurisdiction of a court martial, as well as of the superior courts, immediately named, by the first article of the eleventh section; where the party offending, on conviction, is peremptorily directed to be cashiered.

The forty-third clause of the Mutiny Act directs a forfeiture to be levied of any person, who makes or gives, or procures to be made or given, any false or untrue certificate, whereby to excuse any soldier for his absence from any muster; and the further penalty, that he shall be forthwith *cashiered* and *displaced* from his office, and utterly disabled to hold any military office or employment. The clause does not mention the court where the forfeiture is to be sued for, nor the course by which it is to be prosecuted; but it may be taken to be in some one of the courts of record, where the common penalties of the Act are ordered to be pursued*.

The next offence, of a like nature, is declared by the 48th article of the Mutiny Act, which ordains, that if any military officer shall take upon him to quarter soldiers otherwise than is allowed by the Act, or shall use or offer any menace or compulsion to any mayor, constable, or other civil officer, tending to deter and discourage him from performing any part of his duty, under the Act, shall for every such offence be deemed, and taken to be *ipso facto* cashiered, and disabled as in the preceding case. The conviction may be before two or more justices of the peace of the county, on the oath of two credible witnesses; to be affirmed at the next quarter sessions of the peace of the same county; and a certificate thereof is ordered to be transmitted to the judge-advocate in *London*.

The next clause in the Act declares a like penalty for the

* This, as the preceding, is a military offence also, under the second article of the fourth section, to which *cashiering* is absolutely adjudicable.

unlawful quartering of troops, or the use of like menace or compulsion, in *Ireland*—and the same means of enforcing the penalty—The only difference is that the judge-advocate is required to transmit the certificate received by him to the next court martial, instead, as in the former case, to the commander in chief and secretary at war.

In the instance of private soldiers—the 92d clause subjects them to the penalties * of the Act of the 30th of *George the Second*, " for the more effectual punishment of persons, " who shall obtain, or attempt to obtain possession of goods " or money by false or untrue pretences," who shall make false representations for the purpose of obtaining bounty—and provides a summary means of evidencing the offence, through the certificate of a justice of peace, with proof of his hand-writing.

There are other provisions in the Mutiny Act, declaring officers to be liable to particular penalties, in cases specified, either independent of, or in addition to punishments, to be awarded by courts martial for the offences declared in the Act, or Articles of War; namely, for acting in violation of any of the provisions contained in the 89th clause of the Mutiny Act, for the relief of persons, hastily enlisting themselves; or of the 70th or 73d clauses, respecting carriages and horses to be provided for the conveyance of troops or stores, or of the 87th clause, against the destruction of game by officers or soldiers: or of the 113th clause, against the breaking open the dwelling-house or out-house of any person whatsoever by any military officer without warrant from a justice of peace, under pretence of searching for deserters; or of the 122d clause, against the embezzlement of money, provisions, &c. &c. or military stores, or of the 126th

* Imprisonment, fine, pillory, transportation, whipping, or other corporal punishment.

clause, against the detention of soldiers' pay, by any paymaster, agent, or clerk.—In all of these and some other cases, the legislature has thought fit to accumulate penalties on officers for misconduct therein; but has taken care, on the other hand, so far as it has been devisable, to protect them from harassing or unjust actions or suits, by allowing them to plead the most simple and beneficial pleas; and entitling them to treble costs, in the event of any vexatious legal proceeding carried on against them in the premises *.

The Mutiny Act also supplies authority to the court martial, where it is wanting, from the peculiarity of such courts, to speed or perfect its proceedings, or to complete its jurisdiction. This is provided by those clauses of the Act, that compel the attendance of witnesses; that protect them while they are attending on such courts; and that punish perjury, committed in any of the proceedings therein: and in those clauses, also, that order all original proceedings to be transmitted to the judge-advocate-general; that entitle the party interested to a copy of the sentence and proceedings of the court martial, and that exempt such copies from the operation of the stamp duties: and again, in that clause, which directs copies of the Articles of War to be transmitted regularly, and under the strictest solemnity, to the judges at home, and to the governors of his majesty's colonies, plantations, and territories abroad. Nor is such anxiety less apparent in the numerous clauses of the Mutiny Act, that step in to the aid of the court martial, to enable it to carry the sentence of transportation, whenever it has the power to award it, into effect, and in others, to give greater severity or strictness through the means of the wholesome discipline of the houses of correction or the common gaols of the kingdom, to the imprisonments, which it may think fit to order in particular offences.

* By the 140th clause of the Mutiny Act, 1815.

The legislature has so amplified the jurisdiction of courts martial within the realm, as not to permit any crime to go unpunished, on account of the local circumstances of its perpetration, by rendering offences committed in any of the dominions of his majesty abroad, cognizable therein, and in the same manner, as if they had been committed within the limits of the kingdom *; and by giving authority to courts martial, under the *existing* Mutiny Act, and under the general provisions thereof, to take cognizance of crimes and offences committed against *former* acts of parliament, "for "punishing mutiny and desertion, &c." or against any of the Articles of War, made and established by virtue of the same, in like manner as if they had been committed against the present act †; with the exception of such offences only, as shall appear to have been committed more than *three* years before the issuing of the commission, or warrant for the trial thereof ‡; and by empowering the Crown to exercise a sober and discreet lenity in cases, where its unfettered clemency could not be wisely exerted, by allowing it in all capital cases, when it may deem fit, to chasten the severity of the court's sentence, to transportation for life, or for term of years. It has interfered, also, in the prevention of the wages of an active and honourable service, passing into the hands of the criminal and dissolute; by directing, that any officer, non-commissioned officer, or soldier, shall not receive any part of his pay, from the date of his arrest and committal to prison on any criminal charge § or for debt ||, until the time of his return to his regiment; with this distinction, in the former instance, that in the event of acquittal, he shall be entitled to the arrears of pay due to him, or to a portion of his grow-

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* By the 39th clause of the Mutiny Act, 1815.

† 147th Clause. ‡ 148th Clause.

§ 19th Clause, 1815. || 120th Clause, 1815.

ing pay, during his confinement, at the discretion of the secretary of war, or of the chief secretary in *Ireland*.

Though it be the principal business of the Mutiny Act to define military crimes, and to devise the means by which they may be pursued to conviction and punishment, its office ceases not with this, but it is employed, and never more wisely or profitably, in ensuring, to the members of the military body, comfort in all possible cases, and peculiar consolation in some, where they may occasionally stand in need of it, by providing the means of their easy return to the bosom of the general community, when they are desirous of it, after the completion of the stipulated service; or for the continuation of such service abroad, when they shall be so minded, on the most grateful terms. This attention is abundantly shewn in those numerous clauses in the Mutiny Act, that have been framed, for the purpose of providing quarters, and supplying suitable provisions to the soldier, at limited reasonable rates, much below the common prices paid by others; for the relief of soldiers, falling sick during permitted temporary absences from their regiment, through the medium of the extension of their furlough, and the administration of such sums of money as may be requisite for their subsistence during such necessitous absence *; for the sending of soldiers home from abroad when they are entitled to discharge, free of expense, and the supply of them when landed in the mother country, with conduct and marching money sufficient, to enable them to reach their respective homes †; or when the soldier having an option to return home, may choose, which is no unusual circumstance, to remain behind with his regiment, his comrades or his companions, for allowing him to stay abroad, and complete his service, either in the part of his regiment which may remain, or in some other of his majesty's corps ‡: and for giving

* 115th Clause. † 108th Clause.

‡ 107th Clause Mutiny Act, 1815.

freedom to all negroes purchased on account of his majesty, serving in any of the king's forces, in like manner and in every respect as if they had been born free in any of his majesty's dominions. These are some of the many provisions, made by the legislature in this Act, for the safety, ease, relief, and comfort of the military community; in addition to those contained in other acts, granting asylums, and pecuniary recompenses or rewards to soldiers, in the shape of pensions and allowances, and civil indulgences for long and meritorious services.

Whilst *Ireland* remained a separate kingdom, the troops, serving there, were subject to a Mutiny Act of their own; but since the Union, one annual Act includes the legal provisions applicable to every species of regular force within the united kingdoms; and to all such troops as are mustered and in pay, or may be raised in any of his majesty's provinces, governments, colonies, or dominions, or in countries, colonies, or places in possession of or occupied by his majesty's subjects, or any forces of his majesty*.

The only troops, within the kingdom, excluded from the operation of the general provisions of the Mutiny Act, are those of the militia, fencibles, yeomanry, and volunteer corps of *Great Britain* and *Ireland*, and the islands thereunto belonging: they are, however, liable to such provisions contained therein, as are expressly extended to them thereby, or by the acts referring to the particular formation and government of such corps respectively, and which may be said to constitute their peculiar law in ordinary cases. The chief particularity, in those provisions, attaching to the militia †, and indeed to all other occasional corps, is not in respect of the offences declared by the Act, but in the mode

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* By 131st Clause.

† For the principal Regulations respecting the militia, see the 26th of the king, chapter 107.

of punishing them; for what is a crime in the view of the one, is a crime, generally speaking, in that of the other: the great distinction is, that in time of internal peace and tranquillity, the laws, as they regard those troops, do not in any instance of offence, however glaring, allow of punishment extending to the loss of life or limb. But in time of actual service in the event of invasion, or imminent danger thereof, or in any cases of rebellion or insurrection, it is lawful for his majesty to order the militia to be embodied, under certain previous formalities, and to place it under the command of such general officers as he shall appoint, to be led into any part of the kingdom; and while it continues so embodied, under these especial circumstances, all the officers and soldiers thereof are subject to the whole of the clauses and provisions of the Mutiny Act, without exception. Under the like contingencies, the fencible, volunteer, and yeomanry corps, are also, as in the case of the militia, liable to all the regulations and provisions of the Act.

After this short history of the statute itself, and a detail of its general policy and provisions, it is time to proceed, in the order proposed, to the consideration of those Articles which his majesty is empowered to make, to give energy and effect to the intention and act of the legislature.

CHAPTER VI.

Of the Articles of War.

THE king is empowered by the Mutiny Act, to make Articles of War, in all cases, for the government of his majesty's forces; of which judicial notice is to be taken by all judges, civil or military, and in all courts* whatsoever. For the more effectual notification of these Articles, it is directed by the Act †, that copies of all such Articles, as may be made by his majesty, shall, from time to time, as soon as conveniently may be, be transmitted, under proper solemnities, to the judges of his majesty's superior courts in *Great Britain* and *Ireland* respectively, and to the governors of his majesty's colonies, plantations, and territories abroad; in order, it is supposed, that the civil courts may have legal cognizance thereof, and govern themselves accordingly, both in abstaining from the exercise of a jurisdiction in the matters submitted by the legislature to the peculiar determination of the military courts, and from interference otherwise, by virtue of their general power of superintendence and control, than to check any abuse or excess of jurisdiction, if it should happen, in the courts themselves.

It has been shewn, however, in the foregoing chapter, that the Mutiny Act has itself defined the whole body of military offences, which may be visited, within the united kingdoms of *Great Britain* and *Ireland*, and the islands adjacent

* 35th clause of the Mutiny Act, 1815.

† 36th Clause.

thereto, by a capital punishment; and that it has declared, that no person shall be subjected to any punishment, by the Articles of War, extending to life or limb, for any crime, which is not expressed to be so punishable in the Mutiny Act, nor in any manner, nor under any regulations, for such crimes, as are so punishable thereby, which shall not accord with the provisions of that Act: so that however wide the seeming latitude, given by the legislature to the Crown, to frame Articles of War, it is in reality, when more closely examined, very much narrowed by the clause immediately noticed; which expressly excludes the declaration of any new capital offence by the Articles of War, on which officers or soldiers may be tried and convicted *within* the *realm*; or the variation of the course of prosecuting such crime to conviction, or the manner of punishing it.

In the highest class of military offences the power of the Crown is, therefore, necessarily and strictly limited, whenever and wherever it is exercised in making Articles of War, to have an operative force *within* the *realm*, to the mere description of the crime within the view of the legislature, the mode of pursuing it to justice, and the penalty denounced against it; without authority to deviate, in any material circumstance, from the letter of the statute.

A further limitation would also appear to be put on the power, so confided to his majesty, in all the cases of inferior offence, which the Act has specifically defined, and to which it has thought fit to affix a described and determinate punishment: or it would follow, that the legislature has conferred an authority, which may, at pleasure, dispense with, or annul its legislative acts; an authority, paramount to its own, and inconsistent with the very idea or term of a grant.

Although the legislature, in a vast and indefined body of crime, no otherwise mentioned in the Mutiny Act than under the general term of "immoralities, misbehaviour, or ne-

"glect of dnty," has not chosen to enter into a specification of the particular offences, which constitute it; it has nevertheless marked out distinctly the different species of punishment, which the court-martial shall award to such offences, namely, imprisonment and corporal punishment; and the latter under a declared boundary; namely, that it shall not extend to life or limb. The Crown, in these cases, also, is apparently circumscribed in the sanction which may be awarded by it against the offences, respectively; though it be left at full liberty, as to the description and declaration of the offences themselves, to which such defined punishments may be adjudged.

An eminent legal authority* carries his notions of the limitation of this power of the Crown yet further; for in speaking of it directly, he says: "Even that extensive power," granted by the legislature to his majesty, "*to make Articles of* "*War*" is limited to the making of articles, "*for the better* "GOVERNMENT *of the* FORCES, and they extend to no other "cases, than such as are thought necessary for the regula-"rity and due composition of the army." This would infer, that the power is reduced to the mere framing of Articles for preserving the internal order, and economy of the military body, and for supplying and keeping together its constituent parts, for maintaining their consistency and subserviency one to the other, and directing their general disposition as a whole. But if the learned judge's construction embraces nothing more, than appears to be thus implied in it, it is, surely, not large enough.

It has been just stated, it is true, that the Crown is precluded by the Mutiny Act to make Articles of War, generally, in matters of capital offence; but it is not prohibited, from making Articles, even in these, that shall have full force in

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* *Earl Rosslyn* in the case of *Grant*.

certain seasons, or particular places or situations; and it will be seen, hereafter, that it has been long and constantly in the practice of exercising so unbounded an authority. In all cases, also, of misdemeanor, or the secondary order of military crimes, in which the legislature has not undertaken, or has neglected to define the offence, or the punishment applicable to it, and these, without any enumeration, may be supposed a very extensive class, it is undoubtedly competent for the Crown, under the general authority of the Mutiny Act, if not of its prerogative, to originate the law, by making Articles, declaratory and punitory of such offences, whenever it sees fit.

This is, indeed, the great field of legislation left open to the Crown; the Mutiny Act having, in very few instances, placed any boundary to it.

If then the power of the Crown, to frame Articles of War, be materially restricted in certain respects, it is in some very little limited, and in others altogether free. How large it is in exercise or in action, a slight view of the Articles themselves will abundantly shew.

To these, it is wholly left, as it will be seen, to define and punish, among other things, all acts of the military body, that amount to a breach of the peace, or have a tendency thereto; such as quarrels, using reproaches, sending challenges, or throwing out menaces or threats: such acts also, as might immediately endanger the military state; as the spreading of false alarms, giving false watch-words, or casting away arms; or others, that affect it less directly, such as, the false returns of the interior strength of corps or particular bodies of troops, breaking of arrests, and the temporary unlicensed absences of soldiers from quarters or camp—and offences of a like nature.

The Articles of War also direct the discipline and order that shall prevail in the army, and the internal regulations

and arrangements which shall operate throughout the entire departments of it, and the forfeitures and punishments which shall be imposed or inflicted on officers or soldiers, who shall not conform thereto.

As connected with the above objects, the Articles of War enjoin the observance of religious duties, and order forfeitures and penalties for the breach of them. They ordain the rank of officers and soldiers absolutely and relatively; they provide remedies for the redress of the private injuries of soldiers, from the acts of their superiors; they point out the method and restrictions under which provisions and liquors shall be furnished in quarters or in the field; they state how the accounts of regiments or companies shall be kept, and how the effects of deceased officers or soldiers be preserved and disposed of; and they prescribe the general rules by which the proceedings of courts martial shall be conducted, and the sentences thereof carried into effect. In all of these the power of the Crown would seem to be uncontrolled; as also in the declaration of those especial rules and regulations, that are required for the government of the military body, in times of hostility and actual warfare in a foreign country, which the king, as generalissimo of the national force, is and has been at all times in the habit of exercising.

From this summary view, it would appear, that the province, in which the Crown has an original power of framing Articles of War, is wide in itself; but it is not, as it is shewn, without bounds. If this power, in some things, be of pure prerogative, it is in many, and the most essential, derived from the express grant of the legislature; and being thus communicated, it is only to be traced through the *letter*, and to be exercised in the *spirit* of the grant.

It becomes, from this circumstance, scarcely possible to determine, where the authority of the Crown runs in one

stream with the declared authority of the legislature, and where it severs itself, or flows in a separate channel, without referring to the Mutiny Act; or to decide, without a reference to the Articles of War, whether the intention of the legislature as to the provisions intended by it for the declaration and punishment of certain military offences, immoralities, misbehaviours, or neglect of duty, be or be not carried into due effect, through the Articles of War, which his majesty is empowered to make; and thus the one is alternately useful or indispensable to the illustration of the other. It has been truly said, that to understand the law military, the judge who has to decide therein, should carry the Mutiny Act in his right hand, and the Articles of War in his left; so close and intimate a connexion is there between them.

If one of these two sources of martial law calls for the notice of the military community more than the other, one might be apt to prefer the Articles of War; in as much as the Mutiny Act has intrusted to these to define, in a variety of cases, wherein it has expressed itself generally or loosely, what the law military is, and in others to denounce its penal terrors to those who shall venture to offend against its provisions. The Articles of War may be considered, therefore, as a gloss on the Mutiny Act—explaining, in their particular detail, what is uncertain in the general declaration of the statute.

Attaching peculiar importance to the Articles of War, from this consideration, as well as from the consequence given to them by the legislature, in directing that they should be solemnly made, and published, and acknowledged of all courts, civil as well as military, I may not be thought prolix, in taking notice of their contents, and offering such remarks upon them severally, as they seem to merit or demand. They consist of twenty-four sections, which will

be considered in their natural or numerical order; although such a consideration of them, from its minuteness, may be in some degree inconvenient for myself, and too expanded for the general reader. The pursuit, however, of that simple order, on account of the facility of reference by the military reader for accidental or temporary purposes, as need or occasion may require, is so obviously advantageous as to offer a powerful recommendation of such a course.

Commentaries

ON THE

ARTICLES OF WAR.

SECTION THE FIRST.

Divine Worship.

UNDER this title are included six Articles. Four of them have in view the enforcement of the regular and decent observance of divine worship, and the prevention of the evil practices of swearing or cursing, or reviling the articles of the Christian faith; or profaning the church, or offering violence to the ministers of it; by the declaration of certain forfeitures or penalties against officers or soldiers, who shall be negligent or offend therein.

The remaining Articles enjoin the constant attendance of chaplains in their places, and their sober, discreet, and diligent conduct in the discharge of their official duty; by declaring it to be penal for them to be absent from their corps without leave, or to be guilty of drunkenness, or other vicious behaviour, so as to bring a scandal on their sacred character.

These provisions proceed on the same policy with the common and statute law of the land; evincing the importance of a due sense and respect of religion, to the well-

being of every regulated society. They have not in contemplation the vindication or expiation of offences against God or religion, for the punishment of crimes of this complexion belongs not to any human tribunal; but look only to the reprehension of practices, which, if not discountenanced by the warning voice of the law, might undermine the key-stone, and shake and loosen the very foundation of social order.

ARTICLE 1st ordains,—That all officers and soldiers shall diligently frequent divine service and sermon; and that such as wilfully absent themselves therefrom, or behave indecently or irreverently when present, shall be liable to a definite punishment: *i. e.*—that a commissioned officer, in both or either of the cases, shall be brought before a court martial, and there publicly and severely reprimanded by the president. A non-commissioned officer or soldier, so offending, to forfeit twelve pence, to be deducted out of his next pay; and for the *second*, and every other like offence, to be liable to the like forfeiture, and, in addition, to be laid for twelve hours in irons; the money, so forfeited, to be applied to the use of the sick soldiers of the troop or company to which the offender belongs.

ARTICLE 2d—directs the same penalties, specified in the first Article, against the offenders therein respectively, to be applicable to whatsoever officer, non-commissioned officer, or soldier, as shall use any unlawful oath or execration.

In the amount of the prescribed forfeiture, the Articles would seem to be governed by the principle of the 19th *George* the *Second*, against profane and common swearing.

ARTICLE 3d.—The offence, here described, properly a breach of the common law, inferring blasphemy, or the reproach or derogation of the articles of the Christian faith,

Christianity being part of the laws of England, is left to the civil magistrate to deal with, according to the known laws of the land.

This offence, it may be remarked, is punishable at common law by fine and imprisonment, or other infamous corporal punishment*.

Whilst the crime remained within the cognizance of a court martial, it was treated even with a heavier penalty—the blasphemer being liable to have his tongue bored through with a red-hot iron; and this at so late a period as the reign of *James* the *Second*†.

ARTICLE 4th—Awards a punishment, at the discretion of a general court martial, against whatsoever officer or soldier, as shall profane any place dedicated to divine worship, or offer violence to a chaplain of the army, or any other minister of God's word. These were formerly regarded, in the older ordinances of war, as capital offences; but, as each of them may vary materially from the circumstances under which it may be committed, as well as in the degree of profanation or violence used, the penalty is more humanely and perhaps more wisely left to the determination of the court martial. The fear of a heavier retribution, hereafter, must have, as it ought to have, a considerable influence against the commission of offences, which the laws of man can at any time but imperfectly punish, and can never in any way atone.

This Article provides for the safety of the church and its servants—the succeeding ones consult not less its purity and its reverence, in sustaining, through wholesome restraints, the character and respectability of its ministers.

ARTICLE 5th—Renders the chaplain of a regiment

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* *Blackstone*, vol. 4, page 59.

† Fourth Article of War of *James* the *Second*.

subject to trial by a court martial, and to such punishment as it shall direct, according to the circumstances of the case, for absenting himself without leave from his duty, except in the event of sickness, which it is incumbent on him, of course, to shew to the satisfaction of the court. The *absence*, intended here, though not exactly laid down in the Article, would appear to be a wilful absence from a call of duty, prescribed by any general or regimental regulation; or such a departure from the place, wherein the chaplain ought always to be found, as to endanger or preclude the execution of any sudden or emergent official duty, which he might be required to perform*. It is hence, necessary, that the chaplain should be bound by the same rule of service, with military officers in general.

The punishment to be awarded must not be an ignominious one, nor repugnant to the respect, which should be felt for the holy functions, with which the offender, however unworthily, is charged. If the purity of his conduct save him not from blame, the sacredness of his office must at all times secure him from a degrading sentence.

ARTICLE 6th.—This directs, that a chaplain, who may be guilty of drunkenness, or of other scandalous or vicious behaviour, upon due proof before a court martial, shall be discharged from his office; and this peremptorily, and without power in the court to mitigate the severity of the sentence.

Vice, undoubtedly, becomes more pernicious in its consequences, when practised by those, whose business it is, or ought to be, to discourage it in their preaching, and in the example of their lives; and therefore is it even in a single instance, as here, punished more summarily and severely,

* What the regular duties of military chaplains are, may be learnt from the printed General Regulations and Orders for the Army, in pages 330 333, 338—9, and elsewhere.

than in the case of the commission of a like offence, by an ordinary officer.

If the Articles of War, under a considerate administration of them, may be understood in some respects to pay regard, if not to the person, to the office of the clerical offender; they condescend not to shew a deference, neither would it be fitting, to the body or circumstance of his offence.

The offences mentioned in the fifth and sixth Articles, are subject, as it has been observed, to the jurisdiction of a court martial, but the Articles themselves do not express the description of the court martial that shall take cognizance of such offences. But the nature of the appointment of chaplains, and the established relative rank, and pay, attached to it, being correspondent with the rank and pay of a major in the army, would seem to denote that they cannot be prosecuted in any other than a general court martial.

There is a similar want of description discoverable in the *first* Article, in respect of the court, before which, the offences, in the contemplation of the Article, may be reprehended; which renders the meaning less plain and satisfactory, on referring to principles, than in the case just noticed. The Article directs, that commissioned officers, who wilfully absent themselves from divine service, or behave indecently or irreverently thereat, shall be brought before a court martial, there to be publicly and severely reprimanded; and then proceeds to describe, without any division of the subject, but in continuation of the same sentence, the forfeitures and penalties, to which non-commissioned officers and soldiers are liable, for the like offences—but suggests not, through what court, whether general or regimental, such forfeitures and penalties are to be adjudged.

A commissioned officer, it may be remarked, according to the usage or custom of war, cannot be tried, or condemned

to any *punishment*, strictly so denominated, but by a general court martial. If the Court, therefore, which is to reprimand the commissioned officer, be taken, as it should seem intended, to be a general court martial, it must be a court of the same quality, which is to award the forfeiture and penalty to the private soldier; for one court only is alluded to in the Article. This, however, is asserted on the presumption that the reprehension of the officer, and the correction of the soldier, as contemplated by the Article, is in the course of a regular judicial proceeding, and after a previous inquiry in due form.

But neither of the offences, referred to, speaking of it in a military point of view solely, and without reference to the breach of moral or religious duty included in it, *tanti est*, *i. e.* of importance enough to demand, whenever, and so often as it may be committed, the assembling of a general court martial, in order to take cognizance of it. The quality and quantum of the punishment, allotted to the offence, in either case, is not so high, or so aggravated, as to call for a previous decision, so solemn as that of a general court martial, or perhaps, indeed, of a formal investigation before any other military tribunal. Both the one and the other offence, must be attended always with such publicity as scarcely to admit of much question, in any case; and one is led to think, that the Article, so considering them, treats them as offences of flagrant commission, to be censured and punished, without the form of a trial, after the summary manner of former times, pursued against those offenders taken with the *mainour*, with the fruits or badges of crime in their hands. An instance of a like summary proceeding, without even any intervention or act of a court martial, is ordered by the first article of the seventh section—if a precedent be required.

The means also used, for the discountenance of these

offences, would seem more to be directed to the reformation and amendment of the offender, by censure and private discipline, *pro salute animæ*, than for the sake of public example; and the course adopted to this end, may be regarded in the light of the exercise of a parental or purely magisterial authority, rather than as partaking of a judicial proceeding.

The offences, described in this Article, are as old, in declaration, as the time of *James* the *Second*, and the Article declaring them, is of the same substance and effect, if not of the precise words, with the Article now in force. There is nothing, therefore, to be collected from the former, as illustrative of the present Article.

If the import of the Article be, as immediately explained, it will be sufficient, that the parties, offending under its letter, be summoned before the first court martial, regimental or otherwise, that may be holden on the spot, in order to receive the reprimand, or to have the forfeiture, or other penalties enforced, through the direction of such court.

SECTION THE SECOND.

Mutiny.

Several offences, apparently not of the same character, or the same degree, are comprehended and described under this section.

ARTICLE 1st.—The use of *traitorous* or *disrespectful* words, by any officer or soldier, against the person of his ma-

jesty or any of the royal family, is herein declared to be an offence—punishable in the case of a commissioned officer by *cashiering*; or of a non-commissioned officer or soldier by such *discretionary* punishment, as a general, or regimental court martial shall direct.

This offence was reckoned formerly of so heinous a nature, as to merit a capital sentence. It was so treated by the rules and ordinances of war, in the reigns of *Charles* the *First* and *Second*, and of *James* the *Second*, and even in those regulations, published by the general of the parliamentary army, in the civil wars; whereby it was expressly ordained, "If any one should *speak irreverently* against the king's majesty and his authority, or should presume to offer violence to his majesty's person, he should be punished as a traitor." So necessary has it been always held to inculcate a reverence and respect for the person of the chief magistrate, that in a season of rebellion, when war was actually carrying on against the king's person and his government, it was deemed fit, it seems, to punish any irreverence towards the wearer of the Crown, shewn even in a few inconsiderate words, with the penalty of death.

Since the periods last alluded to, the British laws, under the interpretation put on them by the common law courts, have proceeded on surer and safer principles. In respect to the utterance of *words*, seeing that they derive all their guilt from the temper or malignity with which they may be spoken, and that they are liable to be used under a momentary heat or agitation; sometimes in an unguarded and at others in an unintended way, and in all cases may be interpreted in a manner, from not attending sufficiently to the context of the discourse, different to the meaning of the speaker, and always may be unfaithfully remembered or repeated—it has of late been acknowledged, under the solemn declaration of the judges, "That no words *spoken*, however wicked they may

"be in themselves, will amount to *treason* *." Mr. Justice *Foster*, maintaining the same doctrine, adds—"Loose *words*, "not relative to *facts*, are at the worst no more than bare indications of the malignity of the heart †."

The Articles of War, following this improvement of the common law, have adopted its principle here, considering this offence, consisting merely in words, as a misdemeanor only, but certainly of a high description.

As the offence, after conviction before a general court martial, subjects an officer to *cashiering*, and this without any possible power of mitigation in the hands of the court; and a non-commissioned officer or soldier to a serious punishment; it would seem to be requisite, that the very words, which are said to constitute it, should be distinctly set forth in all charges, founded on this Article, and afterwards sustained strictly, or at least substantially, by the evidence; in order that the court martial may judge, whether any and what criminality is to be attached to the words, working the alleged offence, and the proportionate punishment to be awarded to it.

If in the civil courts a great straightness be required in the support of actions for *words*, "that they be "proved, to the very *letter* of the allegation;" how much more necessary is a straightness demandable in the proof, to be adduced on a criminal prosecution, arising out of the same uncertain and fallible foundation, that may terminate in a grievous punishment?

Words, whether *written* or *spoken*, used by way of argument on any subject, which may incidentally call in question any particular exercise of the royal prerogative, or discretion, come within the meaning of this Article. The disrespect

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* The effect of the judge's certificate in *Pyne's* case, returned in the 4th of *Charles* the *First*.—*Cro. Chas.* 125.

† *Foster*, p. 202.

towards the office, would seem rather an aggravation than a diminution of the offence against the person exercising the sovereign authority. It was so held in the case of *Captain Hawkins* of the *Wiltshire* militia, who was tried and convicted by a court martial, for having published a letter in a public newspaper, " containing (as it was charged) sundry " expressions unbecoming an officer, highly *disrespectful* to " his Royal Highness the Prince Regent, and tending manifestly to the subversion of military discipline." The letter was set forth at length. The court found the prisoner guilty of the charge, and sentenced him to be cashiered, recommending him, however, to mercy, on the ground, " that the court felt strongly inclined to believe, that the " prisoner, from intemperate zeal to defend the character " of a departed friend and brother officer, was prompted to " use the disrespectful expressions, alluded to in the charge, " without any wilful intention of reflecting on the high authority of the Prince Regent."—The sentence of the court was confirmed.

It may be observed, disavowing all allusion to this particular case, that it would be dangerous to admit of excuse for the arraignment of any act, in the exercise of a lawful authority, by the supreme power; which might in its example expose all inferior proceedings to extrajudicial question or censure.

ARTICLE 2d—Describes an offence, and assigns a discretionary punishment to it, of a kindred nature with the crime, specified in the preceding Article. It refers to a *contempt* or disrespect that may be shewn by any officer, non-commissioned officer, or soldier, towards the general, or other commander-in-chief of his majesty's forces; or who may speak words, *tending* to his hurt or dishonour. This, like the last, was held to be a capital offence by the ancient ordinances of war.

It is strange, that the life of man should, at any time, have been put to hazard for a supposed offence, so very lightly and indefinitely described, as in this instance. And yet there is a very notable case on record which may serve to shew how slight a pretence will give colour to a charge so loose, and by what abuse of evidence, under a compliant court, it may possibly be made out. The case referred to is that of *Lord* MOUNTNORRIS in the reign of *Charles* the *First*, which must be generally known, as it is mentioned, rather minutely, by two historians of no little eminence in their times *.

* To those, who have not had an opportunity of reading the case at large, the following extract of it from *Echard*, may not be uninteresting:—

"One *Annesley*, kinsman to *Mountnorris*, and gentleman-usher to the *Earl* of *Strafford*, had, by accident or negligence, suffered a stool to fall upon the *Earl's* foot, while he was under a fit of the gout; which so sensibly provoked his patience" (his *resentment* the arch-deacon should have said, for he *struck Annesley* upon it), "that it came to be the discourse at the *Lord Chancellor's* table; where one said to the *Lord Mountnorris*, 'It was your lordship's kinsman that did this;' upon which he contemptuously answered, "Perhaps it was done in revenge of that public affront 'offered me by my *Lord Deputy* formerly; but I have a brother would 'not have taken such a small revenge.' This coming afterwards to the *Earl's* ear, he caused *his Lordship*, as being an officer in the army under his command, to be tried, by a council of war, 'For moving sedition, and 'stirring up the soldiers against the general." The words being proved, he was deprived of his treasurer's office, and his foot company, was committed to prison, and sentenced to lose his head; and, though by *the Earl's* means, he obtained the king's pardon as to his life, yet the rest of the sentence was fully put into execution.

"This was aggravated as a prodigious course of proceeding; but the Earl dextrously shifted the rigour and severity of the sentence from himself to the council of war, where (as he alleged in his defence) he not only forbore to be present himself, but forbade his brother to appear, though he was an officer of the army; and conjured the court to proceed without any regard to him. And when he had understood the judgment of the court, which was unanimous, he publicly declared, 'he should not lose a hair of his 'head;' and immediately procured a pardon from his majesty. He concluded, that the *Lord Mountnorris* was an insolent person, and he took this course to humble him; and should be content if the same was taken to re-

The legal consequences attendant on the conviction of the different species of offence, contemplated in this article, are happily not now so penal, or, if they were, the persons, liable to the penalties consequent on such conviction, would have a sensible security, felt by every suitor in the king's courts, of whatsoever description they may be, from the present purity of the administration of criminal justice therein. Still, however, the offences themselves, to which they have relation, remain as unsettled and as indefinite now, as they did at the æra last mentioned; and, possibly, may not admit of any nice specification or definition.

It would seem impracticable to set forth in how many different ways a *contempt* or *disrespect* might be exhibited, so as to permit an enumeration of them one by one, or to lay down any fixed standard by which they might all be measured, and governed. But it is fit, that no instance, where such contempt or disrespect might be manifested against the first person in military command, for fear of the evil effect of the example, should go unregarded or unpunished. Hence it is confided to the military court to supply what is

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form him, if it proved no more to his detriment, than the other had been to him.

"Besides this, the *Lord* CLARENDON intimates a more private reason. It seems the *Lord Mountnorris*, having, by his active industry, raised himself from a low condition to large honours and incomes, had usually, by servile methods, worked himself into great trust with the deputies at their first admission to the government; informing them of the defects and oversights of their predecessors; and whenever their office was determined, and they returned to *England*, he informed the state, and those enemies they had contracted, of all their misdemeanors, by which they were sure to meet with disgrace or damage. In this manner he began with his own master the *Lord Chichester*, and continued it to the *Lords Grandison* and *Falkland*; so there was this unhappy dilemma, 'That either the deputy of *Ireland*, while he continued such, must destroy the *Lord Mountnorris*, or *Mountnorris* would destroy him, as soon as his commission ended.'"

Rushworth gives a few additional particulars of this extraordinary case.

wanting in the Military Law. It is for the court martial, therefore, to take care, that the act or speech, represented as the offence in the charge, and afterwards substantiated in evidence, amounts to the crime in the view of the Article. When there is such honour and confidence imposed in the court, it is particularly incumbent on it to shew, by its circumspection and caution, that it is not misplaced.

The crime may consist either in *acts* or in *speeches*.

The *first* are to be interpreted, not by the construction, which a too delicate sensibility, or too nice or too punctilious a sense of honour or self-respect of a particular commander, might happen to put on them, but by the plain and obvious meaning, which a sound, cool, and unimpassioned judgment, such as a court martial is bound to exercise, must necessarily ascribe to them, under the circumstances of the case. The *second* are to be regarded, with all the scrupulousness, with which words will be taken in the constitution of the offence described in the first article, *i. e.* that they will be required to be distinctly proved, in the manner in which they are stated in the charge; but, when *proven*, the court have a large latitude of construction, as to the sense that they will bear.

It is not necessary that the words, constituting the offence in question, should be such, as *must* hurt, or dishonour the general, or commander in chief, actually or at all events: it is enough, under the terms of the Article, if they have a *tendency* thereto. Words, used in derogation of persons in eminent office and trust, are not, when they are ascertained, to be too rigidly weighed, as to their import; for where they are such as might not be thought to bring any great scandal on an ordinary individual, or entitle him even to any legal redress, they are nevertheless taken to be greatly injurious in respect to the high office and dignity of those to whom they are applied, and are on that account punishable. There is no clear definition laid down in this case; but it may be, says the very

sensible editor of the Commentaries on the Laws of England*, "Whatever the courts, in their discretion, shall judge to be "derogatory to the high character of the person, of whom it "(the speech) is spoken†."

Though the Article refers to "words *spoken*" only; and as a penal enactment, it is therefore to be taken strictly, it has been held, as in the case of *Colonel Debeigg*, to relate to *writings* also; that officer having been convicted and reprimanded by a court martial, and directed to apologize for having written letters containing indecent and disrespectful expressions and allusions towards the late *Duke* of *Richmond*, then master-general of the ordnance. Some of the letters were addressed directly to the Duke, and others to a general officer, reflecting on the conduct of his Grace; the publication, in either instance, being held to be tantamount to an utterance of the same matter by word of mouth‡.

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* *Christian* in his note on *Blackstone*, vol. 3, page 124.

† As an illustration of this observation, *Christian* quotes from *Mr. Justice Buller*, "It was held to be *scandalum magnatum* to say of a Peer, 'he was "'no more to be valued than a dog,' which words would be perfectly "harmless, if uttered of any inferior person."

‡ The punishment, in the case of *Colonel Debeigg*, would appear slight, considered with the magnitude of the offence, of which the Colonel had been convicted, having a tendency to strike at the foundation of all subordination through the destruction of the respect due to the first personage in military authority set over him. But it was a mitigated punishment, as shewn, in consideration of the eminent previous personal services of the individual. It shews in admirable contrast, with the judgment, immediately noticed, as affecting the *Lord Mountnorris*. The well-governed moderation of the court martial, as exemplified in the sentence, is not less worthy of remark in this case, than the honourable sentiment of the noble prosecutor, expressed in open court, on receiving the apology of the Colonel. "I flatter myself "(says his *Grace* of *Richmond*) that in carrying on this prosecution, I have "not shewn a vindictive spirit; I hope it is not in my nature. The apology "*directed* by the court, I readily accept from *Colonel Debeigg*. I trust his "future conduct will be regulated by the sentiments which the court has expressed on what is past, and I promise *Colonel Debeigg*, that he shall never "trace in my behaviour, any ungenerous recollection of this transaction."

The case of *Colonel Debeigg* elucidates the Article in another point, where it would not seem to be very clear; namely—"As to the *person* of him, whose state and authority "is intended to be peculiarly secured under the penalty "declared in the Article." The dignity of a general, commanding a separate branch or arm of the national force, is as much within the protection of the Article, as of the general or other commander in chief, set over an aggregate army, composed of a variety of troops. The reason would seem to extend to any officer, whatever rank he may hold, possessing a commission, or acting, in fact, *as* a *commander in chief*; but it extends not, it may be supposed, to one of inferior note or rank.

The last remark is offered for the purpose of preventing the possible confusion of this, with other cases, not exactly of the same quality, nor governed by the same principle, though they may have some of the characteristics of the offence under consideration. The cases, alluded to, refer to public disrespects shewn to, or scandal thrown on officers, not distinguished by any eminent command.

Injurious aspersions, cast on any persons, no matter what their rank, holding his majesty's commission, having a tendency to degrade them in the eyes of the public, or of those subjected to their command, have always been held criminal, but not in that superior degree, as in the case of the same aspersions against a commander in chief; nor would the al-

There is a peculiar propriety in the court *dictating* the apology, out of a visible compassionate attention to the feelings of an officer of long standing and service; and which could hardly have been otherwise made without the loss of great self-respect. But what *man* of *honour* can refuse to abide the *judgment* of a *court* of *honour?* *That* takes away the most bitter circumstance of the submission, reconciles the offender to the censure he is obiged to pass on himself, and sometimes, as in this case, has the further happy effect of reconciling the parties in opposition to each other. Such a judgment may be said to be "twice blessed."

lusions be liable to so nice and critical an examination. These offences are generally stated to be in subversion of good order and military discipline. Thus it was charged, in the case of *Captain Chamberlayne*, of the *West-Essex* militia, to be conduct and behaviour, scandalous and unbecoming the character of an officer and gentleman, and highly prejudicial to good order and military discipline,—for that he, on or about the 12th day of March last, being then in the public mess-room, at Haslar barracks, did assert that he would not believe *Lieutenant-Colonel Duckett* (of the same regiment), if a Bible was put into his hands, and he was to swear; and that he looked upon him to be a sort of fellow, that he would not believe him, by God Almighty, if he took a solemn oath on the Bible, or words to that effect: and on or about the 23d day of the said month of March, that he, *Captain Chamberlayne*, did also, at the mess table of the said barracks, assert, that *Lieutenant-Colonel D.* was the greatest courtier, and damndest poltroon in *England*, or words to that effect.

It was insisted, on the behalf of *Captain C.* and so examined into in evidence, that the objectionable words were spoken of the *Lieutenant-Colonel*, in his *parliamentary*, and *not* in his *military* relation, he being a member of parliament, and referred to some matter then under investigation in the House of Commons.

This species of defence was repelled by the prosecutor—who, in alluding to it, observed,—" The last point upon " which I shall presume to trespass upon the patience of " the court, is, the application made by the prisoner for a " political construction of the words proved to have been " used; but upon which it is the less necessary to enlarge, " as the defence amounts not to a denial, but a palliation of " the fact. But if the doctrine be once admitted, that you " have a right to use the most scandalous and abandoned

"language, provided you can connect it with some public "event, or annex it to any opinion you may think proper "to entertain, licentiousness might indeed flourish, but "discipline would much decay. Injuries would then be-"come conditional, and even mutiny itself would be di-"vested of its horrors, if explained away upon political "opinion; the grossest insult would only require to be ac-"companied with notes; an officer would justify infamy by "the innocence or publicity of the context. If this doc-"trine be once admitted, a man would be exculpated before "a court, not because he has acted wrong, but because he "has thought monstrously; not because he was a disre-"spectful officer, but because he was a great politician: "and it would lead to this monstrous absurdity, that the "quiet and the indifferent man could only be saved by "adopting new sentiments, and offering them to the court "as an excuse for a breach of discipline. And I can sup-"pose a most determined advocate for revolution, and a "most insensate, because ignorant enemy of the constitu-"tion, availing himself of any popular fervour to brand his "commanding officer, even upon supposition, with cow-"ardice and infamy, and then deliberately allege, not merely "that he had a right to do so, but that it was within his "breast what part of his character he preferred to "attack *."

Captain Chamberlayne was found guilty of the charge, and dismissed from the *West-Essex* militia.

It amounts to the same offence, if the words used have a tendency to excite the *public* opinion against the commanding officer, of whom they are spoken. For a crime of the same description, and so charged, *Captain Brown*

* *Published Proceedings of the Court Martial, page* 67, 8.

and *Lieutenant Zouch*, of the Royal *East London* regiment of militia, were dismissed his majesty's service; the one, for "being concerned in writing, or aiding and "assisting in drawing up, framing and publishing, a printed "placard, &c. which was posted and distributed in various "parts of *London* and *Westminster*, and its environs, having "for its object to excite *the public* opinion against his "colonel *Sir John Eamer*;" and the other, "in conspiring "with, advising, and recommending the publication of the "said placard."

The offence would seem more complete, where the words are spoken unguardedly and unreservedly among military men, who may naturally be expected to repeat them—as in the case of *Major Hedley*, of the *Northumberland* militia, who was convicted and *cashiered*, for abusing, in conversation with a serjeant in the regiment, *Captain Thain*, of the same militia, and *Mr. Cockburn, Quarter Master* of the 84th foot. The speeches, containing the particular abuse, were set forth in the charge, and alleged to have a tendency "to lower *Captain Thain* in the estimation of the regiment, "and to create disrespect and dissatisfaction in the minds of "the non-commissioned officers and men towards their "officers,—and consequently subversive of good order and "military discipline."

From the last-mentioned case, it appears, that the use of terms of disparagement or reproach to an inferior officer, is as criminal as if used by the latter to a superior. Here both of the parties scandalized were under the rank of *Major Hedley*. And again in the case of *Lieutenant-Colonel W. Jephson*, of the 17th regiment of light dragoons, who was convicted by a general court martial of having acted in an unwarrantable manner, highly unbecoming an officer, by *abusing* and *ill-treating Assistant Surgeon Samuel Tilt*, of the same

regiment, and adjudged to be suspended from rank and pay for the term of six calendar months*.

In charges, grounded on the second Article of this Section, it is usual to set forth the high station of the officer to or of whom the contempt or disrespect, in words or otherwise, is shewn, it being the most aggravated circumstance of the offence; as in the charge preferred against *Captain Stirling*, of the 1st battalion, 84th regiment, at Bombay—" For con-" duct highly improper and disrespectful, in writing a " threatening letter to his *Commander in Chief*, the Hon. " *Major J. Abercromby* (here the date), *tending* to his " *hurt* and *dishonour*." And so in the charge preferred against *Lieutenant G. Leabon*, of the 67th regiment; which after stating, that under colour of a petition, as for remuneration of services, he had published unfounded and unwarrantable insinuations, has this conclusion—" tending to " the prejudice of the character of his superior officer, *Ma-" jor-General Hatton*, during the *period* of his *commanding* " his *majesty's forces* in the island of *Alderney*.

This shews, as it had been already hinted, that the honour of an actual commander in chief, whether his command be temporary or permanent, is considered to be within the reason and protection of this article.

ARTICLE 3d and 4th—respect an offence *(Mutiny)* that stands conspicuously in front of the line of military crimes. These Articles subject the principal, as well as accessory to the offence, to the judgment of *death*, or such other punishment as a general court martial shall award.

Neither of the Articles specify what the offence of *Mutiny* is, otherwise than it is described in both to be of a like nature or synonimous with *Sedition*. The terms would

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* See *General Orders*, 8th February, 1804.

seem in a great measure convertible*. It is presumed, perhaps, that the term Mutiny is so self-significant, in military acceptation, as not to require any particular explanation.

It certainly must be taken to have an ordinary or familiar meaning, since in the general statute law, the description of the offence is equally neglected, as in the Mutiny Act or Articles of War; and perhaps it may be said, that it is even less defined in the former than in the latter. Hence, perchance, there would be some danger in attempting to describe that, which is already supposed to have a sense known and obvious to all, and incapable of being rendered more plain or clear.

Mutiny, it is to be observed, may be committed in a variety of ways, each distinct from the other, and therefore cannot be sufficiently designated by a single definition. There is certainly no one term in the language, nor any general description, however wide its sweep, that can include every act which may constitute the offence. The generality of the nature of the crime would seem to exclude particularization. All therefore that it may be safe to attempt, is, to mention what has been considered, at different times, to amount to this offence.

The term *Mutiny* bears a common and determinate mean-

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* *Mutiny*—from the French, *mutiner*, is described to be a rising or rebelling against authority. It would seem to have an ordinary application, and that almost exclusively, to *military insurrection*, though it is sometimes poetically and figuratively used to denote a revolt generally. *Sedition*, on the other hand, usually implies a *civil* commotion. The following short passage from *Temple*, is illustrative of both these definitions:—" *Soldiers* " grow pernicious to their *master*, who becomes *their servant*, and who is in " danger of their *mutinies*, as much as any government of *seditions*." *Seditio* is derived by some, more curiously than satisfactorily, from *seorsum* and *itio*, a going backward, as it were, from duty.

ing in all the rules and ordinances of war, from the time of *Charles* the *First*; but previously to that period, there are a number of offences set forth, and particularly in the older military regulations, which at this day would be recognised as Acts of Mutiny, and liable to punishment, as such, which are not, however, described under that name. In these articles, we see death denounced against those; " Who shall " proclaim his own name, or that of his lord or master, so " as to cause a *rising* of the people *;" or those " who are " so hardy as to raise a banner, to draw together the people " out of the army to go to any place whatsoever †;"

Or those " that make any unlawful assemblies of the king's " people, or make any bands, conspiracies, routes, or con- " venticles, or raise and engender murmurers, or grudgings " against the king, or any other person of his host; whereby " might ensue murder, division, dissension, sedition, stir- " ringe, or commocyon of the people in the host ‡."

Or those again, " who shall presume, or attempt by any " means, colour, or pretence, to resist the execution of the " judgment of the king's majesty's marshall, or any judge " ordinary, or any other officer lawful §." In every one of the above separate and varying offences, though it be not so denominated, may be discovered, under different features, the crime under consideration. Each act denotes the complete and full offence, in all but the name, and this consummation is given to it by the Rules and Articles of War, thereafter made.

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* Ordinance of *Richard* the *Second*.—In a similar ordinance of *Henry* the *Fifth*, it is stated—" to make a *gathering* or *assembly* of the people."

† Ordinance of *Richard* the *Second*.—In the war statutes of *Henry* the *Eighth*, there is an article under this title—" For those, that *make* them- " selves *captains*, to withdraw men from the host."

‡ Statutes and ordinances of *Henry* the *Eighth*, under title, " *unlawful* " *assemblies*."

§ Statutes and ordinances of *Henry* the *Eighth*.

In the laws and ordinances of the *Earl* of *Northumberland*, published in 1640, are the following articles, wherein the term *Mutiny* seems to occur for the first time.

" None shall utter any words, tending to sedition, and
" uprore or *Mutinie*, upon pain of death."

" The same punishment shall be inflicted upon those,
" who, after they have heard *mutinous* speeches, acquaint
" not their commanders with them."

" Whosoever shall express discontent with the quarters
" given him in camp or garrison, shall be punished as a *mu-*
" *tineer*."

" All commanders and officers that find discontented
" humours, *apt* to *mutinies*, or any swerving from directions
" given, or from the policy of the army set down, shall
" straightway acquaint the lord-general therewith, or others
" authorized, as they will answer their neglect."

In the Articles and Ordinances of War, for 1643, are also provisions to the same effect:

" No commander or officer shall conceal dangerous and
" discontented humours, *inclined* to *mutinies*, or grudging at
" the orders given to them, but shall make them known to
" the prime leaders of the army, upon the pain to be ac-
" counted guilty of *mutiny*."

" If any man shall by any *words* or *ways*, tending to *mu-*
" *tiny* or sedition, whether for *demanding* his *pay*, or upon
" any other cause; or if any man shall be privy to such *mu-*
" *tinous speeches* or *ways*, and shall conceal them, *both* shall
" be punished with *death*."

The offence is, perhaps, somewhat more marked in the following Articles of War of *James* the *Second*:

Article 13th.—" No man shall presume so far, as to raise
" or cause the least *Mutiny*, or sedition in the army upon
" pain of death, or such other punishment as a court martial
" shall think fit: and if any number of soldiers shall presume

"to assemble to take counsel amongst themselves, for de-
"manding of their pay, any inferior officers, accessory thereunto, shall suffer death for it, as the heads and ringleaders of such mutinous and seditious meeting; and the soldiers shall be punished either with death or otherwise, at the discretion of a general court martial; and if any captain being privy thereunto, shall not suppress the same, or complain of it, he shall likewise be punished with death, or such other punishment, as a general court martial shall think fit."

Article 14th.—"No officer or soldier shall utter any words, tending to sedition or *mutiny*, upon pain of suffering such punishment as shall be inflicted on him by a court martial—And whosoever shall hear any *mutinous* or *seditious words* spoken, and shall not with all possible speed, reveal the same to his superior officers shall be punished as a court martial shall think fit."

Since the 1st of *William* and *Mary*, the annual statute, passed for the government of the army, has borne invariably the name of the *Mutiny Act;* emphatically marking the known application of the term.

If no one of the above-mentioned acts, in the description given of it, nor the whole together, afford any precise idea of the crime of *mutiny*, they will serve to shew at least, what, in military contemplation, has been holden to constitute that offence; and may be, in that view, a guide, to those who may be called upon hereafter to decide, on the customs and usages of war, what conduct may amount to it.

Mutiny, as declared in the instances immediately noticed, is not a rebelling or rising only against a lawful authority; or an insurrection of soldiers to effect a purpose of their own, however otherwise lawful, by their *own means;* or a conspiring together to bring about any end; or debating or consulting together on any subject of discontent, arising out of

a military measure, arrangement, or command, with a view to the contravention of it, but a murmuring* or muttering, even against the exercise of authority, or about real or fancied grievances, in the hearing of the soldiery, to raise, or having a tendency to raise, ill humours or passions, and to stir up disquiet or sedition in the army.

It is not, therefore, necessarily an *aggregate* offence, committed by many individuals; for in the last instance specified, it may originate and conclude with a single person.

So mutiny may consist in the act of *one* person, in opposing by force any act ordered to be done—and more decisively in any violence done to the person of any officer in the execution of his duty.

For an offence of the latter description, *Corporal M. M'Marran*, of the 42d regiment, was tried by a general court martial at *Cea*, in the month of March, 1813, on an *express* charge of *mutiny*, "in discharging his piece at "*Lieutenant A. Dickenson*, of the same regiment, and shoot-"ing him through the body, while in the execution of his "duty."

The court, having found the prisoner guilty of the criminal matter charged, sentenced him to be hanged.

The unfortunate officer died in this instance of the wound inflicted on him—so that the offender might have been proceeded against as for murder; though the latter mode of prosecution, for peculiar reasons, perhaps, was preferred.

It is not uncommon, when one alone is implicated in an offence of this nature, to describe the act, or acts, in which the offence is supposed to be committed, as one or so many instances of *mutinous conduct*, under an impression, as has been more than once observed by judge advocates, that one person cannot be guilty of this crime; and sometimes, per-

* *Murmurationes* is the simple definition of *mutiny*, as described in the commission given to *Sir H. Vere*, by *James* the *First*.

haps, with a view to state or place the offence in a less aggravated light, and so to expose the party, that may be convicted of it, to an inferior punishment, than might have been awarded to him under a direct charge of mutiny.

Thus private *J. Clinton*, in the royal artillery drivers, was arraigned before a general court martial at *Moimentô*, in the month of February, 1813, and convicted on several specific charges, arranged under the general head—

"Of most unsoldierlike, disorderly, and *mutinous* con-
"duct, on or about the 11th of January preceding, at *Ce-*
"*lerico*, viz.:

"1st. By striking *Corporal Earl* of the Royal Artillery
"Drivers.

"2d. By disobeying the lawful commands of *Lieutenant*
"*R. Whyte*, of the same corps, &c. &c. and offering vio-
"lence to him, by charging him with a fixed bayonet in the
"guard-room."

There were other additional crimes, also specified.

The prisoner was sentenced to receive one thousand lashes, and afterwards to be transported for life as a felon.

The commander of the forces confirmed the first part of the sentence, but the latter branch of it he considered as contrary to law; the court martial not having it in its power to transport for mutiny.

It may not be impertinent in this place to observe, that when a general court martial has a discretional power to substitute any other punishment in the stead of death, or any other prescribed sanction, that the substituted punishment must be consonant to martial law, or military usage, or it cannot be lawfully inflicted.

It occurred in the case of two privates, *Wells* and *Molloy*, who were tried by a general court martial at *Assumer*, May, 1812, and found guilty of mutinous conduct, though not in an equal degree, that the first was sentenced to serve

for life in a corps abroad, and the latter to one month's solitary confinement.

The sentence was referred to his Royal Highness the commander in chief, who afterwards signified to the *Marquis Wellington* the Prince Regent's pleasure thereon, *viz.*—

"That his royal highness considered the sentence on "*Wells* illegal, being alone applicable to the crime of de-"sertion*; and under these circumstances there appeared "no other alternative, but that the prisoner should be or-"dered to join his corps."

The punishment adjudged to the other prisoner was graciously remitted.

On a charge of *mutinous* conduct, however substantially it should be made out, it would not seem safe for a court martial to adjudge the highest species of punishment, that it is authorized to award to the crime of *mutiny*, specifically alleged. For though much of the quality of *mutiny* might be assumed in the adjective *mutinous*, the whole is not necessarily implied. In the noun or quality *murderous*, for instance, a great deal of the spirit and essence of murder might be included, and yet if not the whole, it would not be competent to a civil or military court on a conviction on a charge of conduct so described, if it could ever be so described, to

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* His majesty is empowered, by the 5th clause of the Mutiny Act, for 1815, in all cases wherein a capital punishment shall have been awarded by a court martial, to order the offender to be transported as a felon, for life, or for a term of years. And a court martial, in the case of desertion, is authorized, by the 4th clause of the said act, after trial and conviction, to award transportation to the offender, for life or term of years, whensoever the offence shall appear to them not deserving of a capital punishment. But the commutable penalty, is not that of death, but of corporal punishment, and so expressly stated in the clause. This is the only instance, where a court martial may resort to transportation, as a commutation of punishment —but it may award transportation, in a direct way, by the 122d clause of the Mutiny Act, against those convicted of the embezzlement of military stores, &c. &c.

pass a sentence of death: nothing short of mutiny, clearly alleged and proved, can warrant the extreme punishment awardable to it.

In all cases, where the act committed by one person is not considered to amount to mutiny, it might be fit, as well as humane, to characterize it as irregular or disorderly, or contrary to discipline; but when it appears to embrace all the features of that serious crime, the circumstance that it was perpetrated by one actor only does not in all cases vary the species of offence, and make it reducible to another class of offences, as I have before attempted to explain.

But though, in my humble apprehension, the offence of mutiny, in the cases specified, may be as complete with one actor in it, as one thousand, the great and eminent danger, to be apprehended from it, arises out of the tendency of the crime to involve *popular insurrection*. It is of essence in the crime of mutiny or sedition, that the grievances, or pretended grievances, proclaimed or bruited to the army, be blazoned forth in such a tone and manner as to irritate the minds of those to whom they are made known, and with an apparent view to engage others in the feelings or sentiments of those complaining of such grievances. The spark of the crime, thus struck, falling on inflammable matter near it, might, if not instantly subdued by a strong hand, set all about it in an universal flame. The spark, however, must be elicited in a place obnoxious to the flame, or in a way by which it might communicate with inflammable matter.

It is easy to imagine how small a provocation, aggravated and inflamed by a mischievous spirit, may move to an extraordinary pitch the passions of men, associated together in a common band, and held together by common principles and interests; so as to make them throw off all show of subordination. Nor is it difficult to perceive, what might be the effect of a sudden excitement of such passions in men, with

arms in their hands, and habituated to move and act together almost as a mechanical instrument. Hence it has always been the chief aim of the framers of the military constitutions to prevent a principal strength being converted to a possible weakness—to provide that the greatest military virtue, may not, from a wrong direction, from a momentary but a wild impulse given to it, become a vice of most destructive and deadly consequence to the principle of military union.

Seeing by how slight means the greatest mischief may be engendered, by the rapid spread of an infectious spirit in large and constantly-embodied numbers, the policy of the Articles under consideration is, to beat down and repress, in the beginning, the first act or speech that may lead, or have a tendency to lead to so fatal a consequence. The 3d Article, therefore, makes it a capital offence in any officer, non-commissioned officer, or soldier, capable however of mitigation, under the circumstances of the case, who shall begin, excite, cause, or join in any mutiny or sedition; rendering him who shall *lead* or *follow*, in the circumstances, constituting the offence, or who shall take any part in it, either in its incipient state or when it shall be complete; who may stir up by his speeches, encourage by his advice, or stimulate by his example, in joining with those concerned, equally liable to the heaviest punishment.

The 4th, extending the policy of the foregoing Article, renders it a crime, liable to the same punishment, with the principal offence, in any officer, or non-commissioned officer, to *stand by*, whilst any mutiny or sedition is in the act of being committed, and not use his utmost endeavour to suppress it. Or if he come to the knowledge of any mutiny or *intended* mutiny, no matter how, and does not without delay give information of it to his commanding officer. Hence it is declared the positive and bidden duty of every officer or soldier, under the pain, in the case of neglect, of

the severest possible punishment, to aid, to the utmost of his ability, in quelling this dangerous and contagious crime; and to communicate, without delay, what he knows of the commission or the intended commission of it.

The reason on which this no less humane than politic provision is founded, is in the first instance to check a beginning but actual mutiny, by all the available means of resistance present at the time, or spot; or to prevent an impending mutiny, by crushing it in the bud, and before it burst forth in its bitter and unwholesome fruit.

If this the 4th Article casts a new and hazardous duty on officers and soldiers, it adds but little to the moral obligation, incumbent on all men, to prevent, to the extent of their means, the perpetration of public offences against the State of which they are members. It is the correspondent duty of the legislature on the other hand, or of those who make the Law Military, and of those who administer such law, declaring this new tie or obligation, to take care, that it does not entangle those on whom it is imposed in any needless danger.

It has been often objected to the indefinite wording of the 1st branch of this Article, " shall not use his *utmost endea-" vour* to suppress the same," that the officer or soldier may chance to suffer by it, not for any neglect or failure in what he may honestly conceive or feel to be his duty, but in what others may interpret from their different judgments, or informations, such his duty to be, as enjoined under the serious penalty of this Article.

One part of the duty enforced is most intelligible and plain indeed, namely, to communicate to the proper authority, without *delay*, what the individual officer or soldier may know of any mutiny in *fact*, or in *intention*.

The other part demanded of him, namely, " to use his " *utmost endeavour* to suppress the crime of mutiny," is

undoubtedly not so obvious as the first, inasmuch as there is nothing directory, here, as to what may be considered such "*utmost endeavour*."

It were impossible to lay down what in every case would be the *utmost* that an officer or soldier is expected or bound to do; nor could all men's minds be brought exactly to agree in *any* case, what was the utmost thing capable of being done. It is of necessity then left somewhere to determine (and where could it be more prudently committed than to the decision of a court martial?) whether what *is* done, be or be not the *utmost* to a common intent, that *should* have been done.

It is observable even in the first instance, where the duty would seem to be most plainly marked out, that something must be left even there to the construction of a military court; whether the information ordered to be conveyed to the commanding officer of the mutiny or intended mutiny, was conveyed, *without delay* or *not*; which may depend sometimes on the consideration of the means that were taken to convey the intelligence; at others, on the acts, which the officer or soldier might think himself urgently called on to pursue, on the instant, to quell the mutiny, even in preference or previously to his acquainting his commander therewith.

There is and must be in these cases a discretion vested in the Court; and as the safety of every member of the court, as well as of the accused, must consist in the due exercise of it, there cannot be any unreasonable fear, that it will at any time be abused.

It is not the duty of the Court certainly, neither can it be its inclination, to construe the term "*utmost* endeavours" too scrupulously. It will not, in ordinary occasions, have so much to consider or weigh, what has *not*, as that which *has* been done; not to search, with a nice and curious eye, what

might have been done in *addition* to the measures, which the accused may have taken; but to see whether what he actually *did* perform, was done *bonâ fide,* and with a fair intention to put the mutiny down.

It is not to be inquired, what a refined stratagem, or rare intellect, might have attempted or effected in the peculiar case; but what a straight course and a common every-day understanding, must naturally offer or suggest to itself under the occurrent circumstances. It is not then, in such cases, the question, what *might* be achieved by an effort of some fortunate and happy genius; but what must be done, and what all must know, and be taken to be competent to do, by the exertions of the common power of an ordinary mind, in the plain path of its duty, under those direct and honest impressions, of which none can be supposed insensible. But it might seem like presumption, to dilate further on a subject, apparently obvious and intelligible of itself.

As mutiny is the most dangerous crime that can be conceived in the military state, so the most anxious caution has been exhibited, both in the Articles under consideration, and others hereafter to be noticed, and also in positive orders circulated throughout the king's armies, to prevent the occurrence of it; first by prescribing a ready, easy, and well-known course to soldiers, for the redress of their private injuries or grievances, out of which the crime generally springs; and next, by forbidding practices, which, if tolerated, might have a tendency to produce the offence. To this end, all the meetings or assemblies of soldiers, for any purpose, even the most harmless, and in some cases, when the motive is by itself commendable, are discountenanced, and prohibited by the highest military authority. Where the first and last virtue in a soldier is a prompt, unhesitating obedience, the danger of allowing him to consult or debate with

his comrades, either about what is doing, or what is done, must be evident to the plainest understanding.

Sir James Craig, when in the command of *Canada*, censured, in the public orders, an address expressive of the thanks and good will of the privates and non-commissioned soldiers of the regiment to their adjutant, on his retiring from his office; as an unjustifiable and irregular proceeding, as undoubtedly it was; and the order of that commander, issued on the occasion was very highly applauded by his majesty, and held up to the admiration of the army.

If it were once admitted as a right in the soldiery to meet together for the purpose of voting thanks to any given officer; it could not reasonably be denied to them, for it is but a modification of the same right, to assemble together to express by the same means, when they should own a different sentiment towards such officer, their censure or displeasure: or meeting, or pretending to meet, for one purpose, they might, when assembled, either from design or caprice, pursue another quite opposite to it. Wretched would be the state of officers, also, in discharge of duties, often of a very unpleasant nature, if their fame depended on the breath of those, over whom they are obliged to exercise always a very strict, and sometimes a harsh control. The probable mischief concludes not even here—for it is to be feared, that the debates of men in arms, if they were permitted, might not always end like civil discussions and controversies, by a mere reckoning up of voices, when the argument is exhausted, on a division of the parties favouring or adverse to the question in debate; but they might sometimes terminate, not by the strength of numbers, but by actual and potential force. On this account it is judged prudent to prohibit a practice altogether, which in any case would be of very questionable authority, and in most a palpable and dangerous evil.

Mutiny is an offence that may be committed, but the instances of its occurrence are very rare, from the circumstance of better education in them, and consequently better-regulated tempers and habits, by officers, as well as soldiers. It is a rebelling, as it has been shewn, against lawful authority—and there can be no distinction, as to the different grades or degrees between the person commanding, and him who is required to obey. The inferior in place, whether standing one or one hundred steps below his superior, is bound to shew implicit obedience to the commands of the latter, and in case of resistance, would incur the guilt and penalties of mutiny. So long as the relative difference subsists between them, the subordinate is obliged to acknowledge the authority of his commanding officer; though it should be exercised ever so wantonly and harshly.

It is impossible to imagine a case, where authority does not flagrantly outstep the boundary assigned to it, when submission can be refused to it; and none, when absolute resistance, either to contravene or supersede it, can be justifiable or excusable, on any reasonable or recognizable principle. The latter circumstance would amount to a dissolution of all lawful authority; and what would be substituted, in the event of success, in its place?

It is true, that vast mischief may sometimes occur in a distant government, by the arbitrary and excessive exercise of authority by a military or other governor, to the severest injury of those subject to it; but the injury is to be redressed, and there is none without a remedy, by known and legal means. There is not, in the British constitution, or in the administration of it, any authority, save one, that is irresponsible; and *that*, even, is exercised in such a manner, as to involve an indirect responsibility, sufficiently to guarantee the rightful use of it. There can be no excuse, therefore, for persons, seeking to redress their own supposed wrongs

by violent measures, or by the abatement of the power lawfully set over them. It would be a reproach to the law military, as well as the military condition, if it allowed of no alternative, but a patient, slavish submission to temporary ill, or the commission of the greatest crime, in military or civil estimation, to escape from it—*i. e.* no middle choice between obedience and *rebellion.* Fortunately neither citizens nor soldiers are put to an election of this extremity.

The doctrine, inculcated by the foregoing observations, is acknowledged in the case of *Lieutenant-Colonel George Johnston,* late of the 102d regiment. This officer was placed in arrest, on a direct charge of mutiny,—"for that on or "about the 26th January, 1808, at *Sydney,* in the colony "of *New South Wales,* he did begin, excite, cause, and "join in a mutiny, by putting himself at the head of the "*New South Wales* corps, and seizing and causing to be "seized, and arrested, and imprisoning and causing to be "imprisoned, by means of the above-mentioned military "force, the person of *W. Bligh, Esq.* then Captain-General "and Governor in Chief, in and over the territory of *New* "*South Wales.*"

The gist of the defence was, that the arrest of the governor was effected for the purpose of tranquillizing the colony, said to be in a state of great irritation from the supposed violent acts of the governor. The Court, after hearing evidence on both sides, found *Lieutenant-Colonel Johnston* guilty of "the act of *mutiny,* as described in the charge," and sentenced him to be *cashiered.*

The Prince Regent approved the sentence; but in expressing his acquiescence, his royal highness was thus pleased to state the grounds, on which he had been induced to coincide with the judgment of the court martial, in substance as follows:

"The court, in passing a sentence so inadequate to the "enormity of the crime, of which the prisoner has been "found *guilty*, have apparently been actuated by a consideration of the novel and extraordinary circumstances, "which, by the evidence on the face of the proceedings, "may have appeared to them to have existed, during the "administration of *Governor Bligh*, both as affecting the "tranquillity of the colony and calling for some immediate "decision; but although the Prince Regent admits the principle under which the Court have allowed this consideration to act in mitigation of the punishment, which the "crime of mutiny would otherwise have suggested, yet no "circumstances whatever can be received by his royal highness in *full* extenuation of an assumption of power, so "subversive of every principle of good order and discipline, "as that under which *Lieutenant-Colonel Johnston* has been "convicted."

The cases of several officers of the service of the honourable the East-India Company, on the *Madras* establishment, recently tried for a general rising against the local government, hinged and were decided on the same principle.

No court martial has yet laid down the extraordinary and monstrous proposition, that mutiny, under any circumstances, may be justified; though certain political speculatists have inculcated a doctrine of resistance in certain extreme situations, wherein the civil state may chance to be embroiled. There are, happily, no fanciful original rights, or fancied compacts to perplex the military community, and draw them from their plain and simple allegiance; governed by its own rules; in which is to be found no one maxim laxatory of the principle of obedience to a military superior.

It has been previously stated, and may again be repeated, that soldiers may complain of the command of a superior; but they are bound in the first instance to obey. This, I

take, to be an indisputable axiom in military life. For the soldier is holden in his duty, and in his profession, as a soldier, to the state, as well as his superior officer; and no act or command, exceeding the authority of the latter to execute or give, can dissolve the relation of the soldier to the state, for whose safety and protection he has been created and maintained. No apprehension, be it what it may, can therefore set the soldier free from the first great bond, or charter of his service, obedience to command. Otherwise the military obligation might be cancelled, and the military state set loose from all restraint by the rashness or intemperance of a solitary commander—and the best possessions of the Crown, left, by the splenetic humour of the commandant, or his refractory troops, to the mercy of the first invader. It will suffice to state the extravagance of the mischief to shew that it is impossible, that any state could suffer its principal interests to be, at any time, so exposed.

All that courts martial have decided in the cases, to which allusion has been made, is, that extraordinary circumstances, agitating the passions of men, and hurrying them into the heinous guilt of mutiny, may be sometimes considered in mitigation of the punishment, which would otherwise fall, with full and unabated vengeance on the heads of the offenders. It is the exercise of mercy, left *here*, as in many other cases, to the discretion of the military court, to be exerted, when it sees fit, on a review of the palliatory evidence appearing before it, which may justify or not the extension of lenity to the particular case. It would neither be decent, nor fitting to say a word in this place on the decisions, last mentioned; but it is allowable to observe, that in every case it will be incumbent on the party, committing an act of mutiny, in order to bring himself within the lenient consideration of the court, to shew, to its complete satisfaction (a most serious and weighty task!) that the offence was com-

mitted under exasperations or provocations which the proverbial forbearance and submission of a soldier, dictated not less by habit than by duty, were incapable of subduing. The dreadful responsibility attached to the crime, should make the boldest spirits pause, ere they trust for a frail and deceptive defence, not to a justification of their conduct, for that has been shewn to be unjustifiable, but to the mere mitigation of the heaviest sentence which a military court can pass, to the uncertain suggestions of excited or angry feelings, fallible in themselves, difficult to be explained to others, easy to be misrepresented, and capable of misconception. It is an alarming conflict, where success is attended not with safety, and where defeat is death.

As a mutinous spirit receives confidence, from the mere circumstance of its continuation, it is the urgent duty of every officer, and more especially of a commandant, to use the most summary means of repressing it; and neither the Law Military, nor the ordinary law of the land, will be very nice in the consideration or construction of the means used by him, for that honest purpose. Much has and may be done by a prompt and striking act, to lay so mischievous a spirit. *Colonel Kelly*, commanding a detachment in the *East Indies*, on the discovery of a mutiny, in one of his battalions, fomented by the native officers, ordered the troops immediately under arms, and assembling a field, or, as it is sometimes called, a *drum-head* court-martial, seized, at the head of his battalion, the person of the native commandant, and subjected him to instant trial—and on conviction of the accused, by the court, which followed, ordered the offender, without any time for preparation for so awful an end, to be blown away from a gun. This timely execution struck such a terror through the ranks, that no other punishment was necessary to break the confederacy; the body of the muti-

neers being all affrighted from their purpose by the fate of their *head.*

In this case the celerity and severity of punishment was mercy; preventing, probably, the wasteful effusion of much human blood. The necessity of instant example excused here, the dispensation with the set form, and the usual circumstances attendant on the trial of a military offender, and the execution of the military sentence.

There are many other instances, that might be quoted, where the proceedings have been equally summary. But when they are resorted to, it is requisite in every case, in order to justify the departure from legal forms, that it be clearly made out, that the mutiny was flagrant, and that it called for strong and instant measures to put it down; and that the means used were not more violent than needful, and that it was not safe to wait for the trial and execution of the offenders by the ordinary course of military justice. If any one of these circumstances be wanting, or not apparent, the commanding officer will not be justified in depriving the offender of the benefit of a regular trial.

Commanding officers are protected by the law, like civil magistrates, in the exercise of an extreme power in an extreme case, on fair and considerate grounds; but they forfeit their claim to that protection, if they needlessly and wantonly exceed the ordinary measure of their authority. This was strikingly exemplified in the case of *Governor Wall*, tried and executed at the Old Bailey, for the death, or more properly speaking, for the *murder* of *Benjamin Armstrong*, in consequence of a military punishment at the settlement of *Gorée*, in *Africa*.

The following are the brief circumstances of the case:—

Armstrong, in the year 1782, with several other soldiers, had gone to head quarters, in an embodied manner, to re-

quire that they might be paid certain arrears, allowances, or compensations (said to be due to them), before the paymaster, who was about to quit the settlement with the governor on the next or following day, should be allowed to leave the garrison. The soldiers, so drawn up, were warned by the governor, or at his instance, to return to their barracks; they nevertheless appeared before the government house a second time, with *Armstrong* at their head. They appear to have gone back, when ordered, and no riotous proceeding to have happened on the spot, in view or hearing of the governor. When, however, the men had returned to their barracks, certain direct mutinous acts are stated to have taken place. The officers and soldiers in the garrison were thereafter ordered under arms, and to form a circle—when a drum-head court martial was constituted within the ring, under the orders of the governor, which were directed to inquire into the preceding transactions; before which court, *Armstrong* and others were arraigned and tried for mutinous conduct, and found guilty, and corporally punished on the spot. The punishment was inflicted by *cats*, not of the ordinary kind. *Armstrong* suffered severely under the lash, and a mortification or gangrene in the part on which the punishment was inflicted, took place, which was said to be the immediate cause of his death.

Complaints, relative to these transactions, were forwarded to the secretary of state's office, and the governor was apprehended under a warrant of that officer; but found means to escape from custody, and to retire abroad, where he remained several years, after which he returned, and took his trial.

The great question insisted on before the court and the jury, was, whether a *mutiny* existed in the colony or not. In that event, it was admitted by the attorney-general, that the summary punishment inflicted on the deceased might

be excusable. The admission of the counsel for the Crown is directly to that effect—and is otherwise noticeable for its spirit. After having once laid down his principle, the crown officer repeats—

"I say again, if there existed mutiny in this garrison, or "any appearance of mutiny in it, which required the "strong arm of power to suppress it; a crime so enormous "in its size, and dangerous in its consequences, might su- "persede the ordinary course of trial; and I do not stand "here to require you, nor will I require it any where, to "consider a man acting, in such case, as criminal, when he "did the best he could, and acted with good intention, al- "though some excess attended his conduct. But if no "mutiny exists, but is assumed, for the purpose of screening "a man, who inflicts an unauthorized punishment, then he is "so far from being meritorious, that he becomes a culpable "individual."

Witnesses were called on one side and the other, to prove and disprove, according to the different interests of the respective parties, the fact or existence of the mutiny, on which the conviction mainly depended; and it happened here, as in other cases, where parties embroiled have to establish opposite accounts of one transaction, that there was much contrariety of evidence.

The *Lord Chief Baron*, in summing up the evidence, among other things, observed to the jury,—"You will con- "sider, whether the prisoner was placed in that situation, in "which a good officer is under the necessity of acting with "the greatest severity; or whether the defence has been "*contrived* for the purpose of excusing this transaction: "this is the *great point*. If there was *no* mutiny, the de- "fence will *not* avail. If there WAS mutiny, then you will "have to consider, whether the punishment was not un- "justifiable, and whether the instrument used, and the

"manner in which the punishment was inflicted, were not "of such a nature as to imply malice *propense*."

The *Chief Baron* remarked, in another place, adverting to the duty of a drum-head court martial, as to the punishment which it is authorized in awarding;—"You will judge, gentlemen, from the evidence, whether the circumstances indicate even a carelessness for the life of man, and *that* "you must do by weighing the quantiny and portion of the "punishment inflicted. *We* all know that these drum-"head courts martial, like all other courts, have a discretion "to exercise. They are generally held upon an emergency "and the spur of the occasion, but are not exempt from "being bound by the rules of good sense and humanity. "Masters and parents have authority to correct their "servants and children, but they must not use their authority to excess. No apology can be made for an excessive quantity of punishment, even with a proper instrument, because the long continuance and severity "of pain may be productive of as fatal consequences as "would result from instruments of more immoderate description."

It has been already observed, that the verdict of the jury was against this unfortunate officer; negativing, of course, the existence of the mutiny, which alone could have served to his defence.

It would in any case be unseemly, to arraign the verdict of a jury, given under the responsibility of an oath.—It must be taken in this, as in all other instances of capital offences, to have been returned under a full and conscientious impression of the guilt of the prisoner; and the mind must be always concerned, when any external circumstance occurs that can suggest even the slightest doubt, that the impression of the jury may have proceeded, on a view of things, through a prejudiced, though unsuspected medium.

The execution of this unhappy man, was attended with so many circumstances, on the part of the populace, of unfeeling and coarse barbarity, happily so unusually discoverable in a British public, that it is hard to account for them, but through a supposition of a deeply conceived prejudice against him, which by possibility might have found its way, unheeded, to the hearts of his jury; or have had its influence in a quarter, where its effect would be equally deplorable. It must not on the other hand be forgotten, that the offence of which the unhappy governor was convicted, was of so aggravated a kind, as naturally to steel the human heart against the interposition of mercy.

Some years ago, there was another conviction at the Old Bailey, of a field officer (*Major Mc Kenzie*), on a similar indictment, and committed almost on the same scene, which turned on the like premises. The deceased, in this latter instance, had been blown from a gun. But the pardon of the Crown was extended to this officer after a confinement of some duration, from some excusatory circumstances in the individual case.

The humanity of a British officer, without the history or example of these or other similar cases, will incline him on all occasions to be circumspect, in the use of so summary an authority; which might possibly implicate him in the suspicion of so atrocious a crime as that of murder: whilst his natural courage will never make him shrink, from promptly drawing forth this delicate power, when the interests of his country or of the community, over which he is set, require that he should use it with extraordinary energy in a situation of danger*.

* All nations have punished this crime with exemplary severity; and in urgent cases, without the regular form of trial. *Tacitus* describes an instance of a curious and extraordinary punishment, which took place in *Upper Germany* on the *Rhine;* of which he gives the following account.

The crime of Mutiny is considered in the same serious light by the ordinary law of the land, as by the Articles of War—the 37th of *George* the *Third*, c. 70, declaring it a felony in any person, without benefit of clergy, "who shall "maliciously and advisedly endeavour to seduce any person "serving in his majesty's service, by sea or land, from his "duty and allegiance; or to *incite* any person to *commit* any "*act* of *mutiny*, or *mutinous practice*."

ARTICLE 5th.—One or more of the offences, described under this division of the second section, might seem to be included under the third Article; being apparently an act of Mutiny. A disobedience to the lawful commands of a superior is undoubtedly a crime of that description. But *Mutiny* may be supposed to infer a previously tainted or infected mind, and a conspiring with others, as ingredients in the offence, and hence it may have been thought necessary to describe this and the other crimes specified in this Article in a substantive manner, and as of a character by themselves, irreducible to the term of Mutiny. Each of the offences, herein particularized, might be taken with other concurrent circumstances as an overt act of Mutiny, but none of them, perhaps, strictly by itself.

The criminal acts alluded to in this place, may concern only two individuals, the inferior and superior; and may not

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"The soldiers were now incited by sentiments and passions unfelt before: they seized the ringleaders of the sedition, and delivered them loaded with irons, to Caius Cetronius, who commanded the first legion. By that officer the delinquents were brought to immediate justice. The form of proceeding was as follows: the legions under arms were ranged round the tribunal: the criminal was set up to public view: if the general voice pronounced him guilty, he was thrown headlong down, and put to instant death. In this mode of punishment the soldiers concurred with ardour: by shedding the blood of others, he thought his own guilt was expiated. The measure, however violent, received no check from Germanicus."

Tacitus, lib. 1. *sect.* 44.

implicate more than the principals or agents, and may occur, without any preconcert, and therefore may want the grand feature generally to be found in the crime of Mutiny. But be this as it may, the Mutiny Act, and the Articles of War declare the acts, set forth in this Article, offences *of themselves*, and so they are treated, separate from Mutiny.

All the criminal acts, here specified, or intended to be specified, draw after them, when proved, a capital punishment; mitigable, however, at the discretion of a general court martial.

The first crime described, is, in its aggravated extent, of no doubtful nature or enormity: it is constituted by the outrageous act—" of an officer or soldier *striking* his superior in " the execution of his office." Not only the crime and the law is marked with clearness, but the guilt is equally as intelligible to the most common understanding. This is not an offence, recently pronounced to be capital by the Mutiny Act: it has ever been deemed so from the earliest times.

But in the further provision of this Article, it is stated to be a species of the same offence, but not, surely, of the same criminality, in those, " who shall *draw*, or *lift up* any *weapon*, " or *offer* any *violence* against a superior officer." It is an indispensable part of the character of all of these offences, and the foregoing one, without which they will not be consummated, that they be committed against a superior in the *actual execution* of his *office*; wherein he is placed and protected by the law; where his person is peculiarly sacred, and where his quality and his authority must be presumed to be known; and therefore claim to be respected. Any offer of violence to him in such a situation, any show of contempt is in a high degree reprehensible—doubly so, than if he was free, at the moment, from the duties of his office, and had fallen undistinguished into the common rank of life.

But though superior military office is at all times entitled

to respect; it is not necessary that it should be enforced through penalties, so awful, as are held out against disrespect or the threat of injury or violence in the body of the 5th Article. The acts, contemplated, are of serious offence, requiring, on account of their dangerous tendency, a grave but moderated punishment; not one, it may be conceived, of *death*, whilst a distinction may well be taken, and is generally taken, between the guilt, and the punishment to be allotted to a crime *perpetrated*, and a crime *imagined* only. None of the acts, or motions towards acts of offence, here referred to, extend further, in their worst circumstances, than to *imperfect* crime; consisting merely in *intention*; which might or might not ultimately, from the continuation or abandonment of the design, terminate in a full and complete offence. There is a possibility in all the instances, that the parties, who should be so much guilty, as the letter of the Article supposes, might repent within the period of the intention, and the reduction of it into action; and is the *locus penitentiæ*, a short but desirable breathing place for reflection and repentance, cut off from the military community? Such an interval is granted, in indulgence to human frailty, by the common allowance of the law, in all acts, that may affect the common members of the state; and there would appear no rational ground for withholding it from the soldier, unless his condition should absolutely demand another rule, and *that* rule should be plainly and unequivocally laid down, and the reason of it explicitly vindicated, in the Article declaring the crime, to the legislature, and those whom it even more intimately concerns.

If the Law Military, declared in this article, as at the first blush it shews, be clear and definitive in its provision, and in its principle, that these apparently incipient, but imperfect offences should incur the punishment of death, it would ill become him, who professes to inquire into, with a

view to sustain the principles of the Military Institutes, to express any slight surmise of the existence of the law, or to impeach the policy, on any speculative reasoning, on which it is founded. I am not insensible, that I am treading, here, on delicate, and, by some it may be thought, dangerous ground; and it is not unnatural, that I should advance with an uncertain and tremulous foot. But it would be disingenuous and perhaps dishonest, feeling as I do very strong and irremovable impressions, after the best deliberation I have been able to give, and the best information and advice that I could procure and receive on this Article of War, if I were to forbear stating, for the consideration of higher authorities, should this book chance at any time to fall within their hands, that there is no light reason to apprehend that the heaviest punishment, awardable against the general offences, particularized in the Article, is not, in the greater number of the crimes described, conformable, as it should seem, to the intention of the legislature, or to the letter or spirit of the Military Law; and hence a suspicion may arise, which ought not to exist, in a matter of this vast importance, whether such punishment can be lawfully awarded under the provision of the Article.

This, like every other Article of War, legislating in a matter of life or limb, must be understood to depend on the authority of the Mutiny Act, and must therefore be construed and interpreted, and indeed bounded by the letter of that statute.

In viewing the 5th Article of War of the second section, it appears most plain and simple, in its denouncement of the pain of death to any officer, non-commissioned officer, and soldier, " who shall *draw*, or *offer* to draw or *lift up* any " weapon, or *offer* any violence to his superior officer in the " execution of his office." There can be no doubt here of the definite description of the offences, or of the punish-

ment adjudged to them; the doubt arises out of another quarter; namely, of the supposed authority, by which the punishment is awarded to the offences described.

In the Mutiny Act, the whole body of military crimes, that may entail the extreme punishment of death, are succinctly, but very carefully enumerated, in the very foremost section; where each offence is formally and technically described, and has a precise meaning attached to it. In this long and black catalogue are numbered the crimes which it is the business of the 5th Article todescribe and punish. In respect to these, the Mutiny Act expressly declares, "that "if any person who is or shall be commissioned, or in pay "as an officer, or who is or shall be listed or in pay as a non-"commissioned officer or soldier, shall at any time during "the continuance of the act, *strike* or use any *violence*, "against his superior officer being in the execution of his "office; or shall disobey any lawful command of his supe-"rior officer, shall suffer *death*, or such other punishment, "as by a court martial shall be awarded."

There is no other provision in the Mutiny Act, referable to this class of crimes; and in these are not to be discovered the features of several offences, named in the 5th Article of the second section. There is nothing contained in the act, so far as is apparent on the face of it, that relates to the offences, whatever they may be, and howsoever they may be punishable, "of *drawing* or *offering* to *draw*," or "*lifting up* any *weapon*," or "*offering* any *violence*" against a superior officer; and they cannot necessarily be inferred to be of the same description and colour of the crimes, mentioned in the Act; inasmuch as the latter consist, not in *meditated*, but *actual* force, not in *offered* violence, but in violence *really used*—crimes of a broader and bolder front, and consequently of a deeper dye.

In looking at the crimes, to which the legislature appears

to have assigned their reward, in the last punishment of the law, namely, "the *striking* or the *use* of violence against a "superior officer," the eye and the mind immediately recognise the offences denounced, and the guilt embraced in them. They are great and palpable criminal *acts*, in which evil and criminal intentions must be included. One of them, the *striking* of a superior officer, is the description of a positive and precise crime that admits not possibly of two constructions: the other, the *use* of *violence*, though the species of violence intended is not mentioned, is nevertheless of that fixed quality, which cannot be misunderstood. It implies an actual *personal injury* to the superior officer, that would amount, at law, to a violation of the peace: it cannot intend any mere fanciful outrage of his feelings, or sensibility, for these could not be the objects of concern to any rational law; but such an actual violence as *battery*, false imprisonment, or other personal injury or restraint. All of these savour strongly of crime, and are so considered in the common law courts; though they are not there dealt with, such unhappy results not following, nor being likely to follow from them, in ordinary society, as in the military state, as crimes of magnitude.

For reasons particularly applicable to the constitution of the army, it has been thought politic by the legislature, and most wisely, from the manifest danger attendant on acts of this description, to exalt them into the highest species of crime, in order to deter officers and soldiers from the commission of them; and seeing the serious consequences that may flow to those who may unfortunately commit them; the legislature has taken pains to point them out clearly and simply, so as to leave nothing for inference. Indeed all penal enactments, more especially those declaring the highest possible penalty, must speak for themselves—and are not liable to arbitrary construction. They are always to be taken

strictly, as regards the *offence*, but *liberally*, as they may affect the *life* or *safety* of the *offender*; i. e. it must be seen that the offence stated and proved, or capable of being proven, be in substance and essence, what the law has defined, and not any *other*; and that if there be a doubt of this, that the offender is entitled, not in liberality only, but in common justice, to the benefit of that doubt, in being liberated from the peril or penalty of the offence.

Considering the offences "of *drawing*, or *offering* to draw, "or *lifting up* any weapon, or *offering* any violence against "a superior officer," described in the 5th Article of the second section of the Articles of War, with those of "*striking* "or *using* violence," as specified in the Mutiny Act, and which are the only crimes of this complexion, mentioned in the Act, it is impossible to pronounce them the same offences, or of the same extent of crime; as neither of them imply actual force or violence, used towards the superior officer; and any thing short of this, does not constitute the crimes which the Mutiny Act declares to be capital, and to which it allots the penalty of loss of life.

It would not be easy to say, what act might be supposed to amount to an *offer* to *draw*, or an *offer* of *violence*, as within the meaning of the 5th Article—but be it what it might, it should and must be supposed, less than really *drawing*, or *lifting up* any weapon; and the latter act, however criminal, is obviously inferior to the *striking* of a *superior*, or the actual *use* of *violence* against him; which is distinguishable from all of the preceding offences. The crimes or advances to crime, specified in the 5th Article, are of different shadows and gradations, one rising above the other, and so noticeable one from the other, that the difference must be acknowledged at an ordinary glance. How then can they be taken to form one mass of criminality,

inseparable and indivisible, punishable universally with death?

No other construction, and it would be difficult to reconcile such a construction to common sense, than that the *drawing*, or *offering* to *draw*, or *lifting up* a weapon, or *offering violence*, is the self-same thing with "*striking*" or "*using* actual violence," could seem to authorize the penalty of death, as awarded by the 5th Article, founded, as it must be and is, on the principle and authority of the Mutiny Act.

Reference has been made to the earlier ordinances of war, in an endeavour to account for the introduction of the incohate offences immediately referred to, among the crimes, perfect in all their character, and so declared by the Mutiny Act; and from a view of the 15th article of the ordinances of *James* the *Second*, it appears—that offences thus imperfect, are therein described, almost in the same words, as in the Article under consideration, and are directed to be punished with death, or such punishment as a general court martial shall think fit*. In the articles, now subsisting, for the government of the navy, there is also a provision to the like effect.

The Articles of War, now in force, may have owed something of their original form, for there are many common resemblances every where discernible in the one and the other, to the rules or ordinances of *James* the *Second*, or the articles for the government of the navy; and the form may

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* "If any officer or soldier shall presume to resist any officer in the "execution of his office, or shall strike, or lift up his hand to strike, or "shall draw, or offer to draw, or lift up any weapon, against his superior "officer, upon any pretence whatsoever, he shall suffer death, or such "other punishment as a general court martial shall think fit."—*Rules and Articles of War, of James the Second, Article* 15.

have been retained without adverting to the essential change, that had since taken place in the law martial, in respect to the higher class of military offences, suffering them not to depend, as formerly, on supposed relations to crimes, affecting those engaged in a distinct species of public service, or on antiquated rules, the principles of which had varied, with the variation of the State, to which they were originally, but are now no longer applicable. It is hardly necessary to observe, as the naval and military services are distinct, and, from very obvious circumstances, may require a very dissimilar policy, that the rules of the one can have no just application to the other, any more than the arbitrary regulations of *James* the *Second*, issued of his mere prerogative, can have the effect of countenancng Articles, which must now depend, for all their validity, whatever that may be, to the direct and express letter of the statute law.

The Mutiny Act ordains, that the *striking*, or the *use* of *violence* to a superior officer, in the execution of his office, is a capital offence, to be answered with the life of the offender; but it contains not any provision, declaring that the *intent* to *strike*, or the *offer* of *violence*, howsoever manifested in the movement towards the Act, shall constitute the same crime, or superinduce the same punishment. But the Crown, by virtue of the Act, is empowered to make Articles of War, of which all courts are bound to take judicial notice. And in pursuance of that power, has actually made Articles, wherein it has declared it to be a capital offence even to *draw*, or *offer* to *draw*, or *lift up* any weapon, or *offer* any violence against a superior officer.—But then the statute, granting such power, has limited the exercise of it, by providing, that no person shall be subjected to any punishment extending to life or limb, for any crime not expressed to be so punishable by that Act; excluding the Crown thereby from making Articles, increasing the number of capital

crimes. And the offences of *drawing*, or *offering* to draw, or *lifting up* any weapon, or *offering* any violence to a superior officer, are not mentioned in the Mutiny Act, as liable to extreme punishment; and therefore the crimes specified and the punishment awarded by the 5th Article, in these cases, cannot, it is presumed, be taken legal notice of, or enforced by any sentence passed by a court martial thereupon, being repugnant, as it should seem, to the authority of the statute, by force of which the court derive all their power to take cognizance of those, or, indeed, any other crimes.

If it be conceived, that the crimes specified in this Article, as being found under the head of Mutiny, are therefore *ejusdem generis*, or can be drawn into that description, so also it might be predicated of the offences, as they are discovered in the same company, set forth in the first and second Articles of the second section; which will not be contended. Besides, though they be joined together under one head in the Articles of War; they are separated and stand far apart in the Mutiny Act, as offences having no relation to each other.

Should it on the other hand be considered, that the Article in question is framed on the general authority given to the Crown by the Mutiny Act, to make Articles of War on the same subjects, in which the Act has undertaken to legislate, and that this Article tends only to explain and to modify the same offences, evidently in the contemplation of the Act; then it will be seen, that it is one of the express limitations put on the power of framing Articles of War; that the crimes punishable under them, when they affect life or limb, shall not in any manner, or under any regulations vary, from the provisions of the statute *. So that such a modification, tending as it does to amplify the number of capital crimes

* Vide 38th section Mutiny Act, 1815.

would appear to be against the letter and spirit of the Act; which means not only to guard against the extension of the higher order of military offences, but the variation also of the description and character of such offences.

These suggestions are thrown out, with all due deference, to the consideration of the authorities, who, from time to time, advise or frame the Articles of War; and more particularly, and more earnestly to the notice of those who may be called upon to give effect to their provisions. If these hints tend to remove any rational doubt, in a matter of this high importance, or introduce greater safety or satisfaction in the administration of the law to the army, their purpose will have been amply answered.

The only offence which remains to be considered under this Article, is *disobedience* to the *lawful* command of a superior officer.

As obedience to command is the chief military virtue, in relation to which all others are secondary and subordinate, so disobedience, which may infer not only the partial absence, or want, but the absolute renunciation of that quality, is reckoned among the principal military crimes, and is justly liable to the most exemplary punishment. It is evident, that none of the purposes, for which an army is raised, could be effected, but by the concentration of its force in action, and which would not at any time be obtained, but by the unity of command; for a division and a consequent dissipation of its strength, would undoubtedly be endangered at every interval, if the individual members of the army were left, like ordinary subjects, to act at their discretion; and therefore to ensure consistency, energy, and weight in its operations, and security to itself as a corporate association, the Constitution has submitted the actions of the army to be directed and controlled in every thing by one supreme commander, from whom by a number of communicating branches

in a continued, uninterrupted, and unabated stream, all orders are made to flow to the individuals, near or remote, attached to the military state; which orders, as they partake all alike of the essence of supreme command, every officer or soldier is obliged implicitly to obey.

So general is the rule, that the orders of a superior shall be imperative on the military inferior, that it will admit not of exception, unless in the instance when the orders, or more accurately speaking, the things commanded to be done, are directly repugnant or contrary to law. In the case, only, when the orders would afford no legal excuse in a court of law, for the act committed under them,—can the inferior question or hesitate to obey the commands he receives from his superior; such as if he were directed, in a moment of delirium by his officer, to fire on a peaceable and unoffending bye-stander, or, if such a thing could be supposeable, to plunder the property, or commit, or assist in committing some personal injury on a fellow-subject. It is only then in orders, which, if executed, would effect some palpable outrage against moral or religious obligations, which all laws profess to regard, and which cannot be superseded by the partial regulations of a particular society, that soldiers can hope to find indemnity, in resistance of the commands of a superior. And, even there, when the alternative is between two offences, and the choice must be determined by the adoption of the less, instead of the greater; of the disobedience of command, or of the commission of some outrageous civil or military crime; the responsibility will always be upon the inferior, and in this case a dreadful responsibility, to shew, that the commands, which he would otherwise be bounden to obey, are manifestly and palpably illegal; else he may involve himself in the guilt, and certainly in the penalty of a positive crime, under the supposition or pretence of avoiding an imaginary one.

The 5th Article of this section makes every disobedience to the lawful command of a superior, punishable with death, or such other punishment as by a general court martial shall be awarded; and being so highly penal, it may be fit to consider, what constitutes the disobedience in the intention of the article and the legislature.

Disobedience may be either *negative* or *positive*. It may consist in the non-observance or neglect of what is enjoined in the orders of a superior, issued or published, long anteriorly to the commission of the act of disobedience, such as general regulations laid down by proper authority for the conduct of officers or soldiers in a particular regiment, or military division or detachment, or of standing orders, to be observed throughout the entire army; or it may consist in the refusal or resistance of commands, instantly and presently given, and directed to be obeyed with promptitude. There would seem to be no community in the offence, none undoubtedly in the guilt of it, under one or other of these circumstances.

In the *first*, the orders might be of no immediate urgency or of no great importance, and the disobedience to them might arise out of simple negligence, or possibly a momentary forgetfulness of the existence of the particular orders, or out of a sudden, unguarded, or unperceived lapse into crime—in none of which cases, is there implied any bold or wanton defiance of authority; or any more offence, than is provided against in the 2d article of the twenty-fourth section, and which is regarded as a military misdemeanor only, under the description of a *neglect*, "to the prejudice "of good order and military discipline," to be punished at the discretion of a general or regimental court martial.

In the *second*, the absolute resistance of, or refusal of obedience to, a present and urgent command, conveyed either orally or in writing, by the non-compliance with which some

immediate act necessary to be done, might be impeded or defeated, as high an offence is discoverable, as can well be contemplated by a military mind; inasmuch as the principle, which it holds out, would, if encouraged, or not suppressed by some heavy penalty, forbid or preclude a reliance on the execution of any military measure.

It is this *positive* disobedience, therefore, evincing a refractory spirit in the inferior, an active opposition to the commands of a superior, against which, it must be supposed, that the severe penalty of the Article is principally directed. This highly criminal disobedience may arise, either out of the refusal of the officer or soldier to act as he is ordered;—to march, for instance, whither he is bidden—or to desist from any act or purpose which he is prohibited by a direct command from pursuing; for it would in many circumstances, which may easily be imagined, be as dangerous to persist in a forbidden course, as to decline or recede from one that is commanded. Whether the orders of the superior enjoin an active or a passive conduct, the officer or soldier, subject to them, is equally obliged to obey. Otherwise every military operation or enterprise would be made to depend, not on the prudence or counsel of the commander, but the will or caprice of the soldiery, either for the furtherance or obstruction of its object.

Prompt, ready, unhesitating obedience, in soldiers, to those who are set over them, is so necessary to the safety of the military state, and to the success of every military achievement; that it would be pernicious to have it understood, that military disobedience, in any instance, may go unquestioned.

It is not to be overlooked, notwithstanding the construction, or modification, which the *disobedience*, contemplated in the Article, may appear to be capable of—and which favourable sense, is often put on the severe terms of its letter,

by the lenient sentences pronounced by courts martial on cases of a *negative* character, or of minor consequence; that the 5th Article, in fact, makes no distinction between one act of disobedience or another. And that when any is to be made, it must always depend on the view, which a court martial may take of the circumstances submitted to it, with their contemplation of the spirit of the Article, or the Mutiny Act; and that wherever it is made, it will be, not in relaxation of the principle of implicit obedience, inculcated by the Article, but in the exercise of a discretion, lawfully resident in the court, to mitigate, according to circumstances, the rigour and severity of the law.

Except in the solitary instance, where the illegality of an order is glaringly apparent on the face of it, a military subordinate is compelled to a complete and undeviating obedience to the very letter of the command received. The most important consequences may often rest on the precise, mechanical execution of an order; which, in appearance to the military inferior, may have a substantive and a sole object in its view, while in the design of the commander, it may be combined with a vast and various machinery, and a deviation from it, even with the best intentions, and the best success, separately considered, might defeat the grand end of the meditated enterprize. Hence it is scarcely possible to imagine a case, when a subordinate officer would be at liberty to depart from the positive command of his superior. The justice of the Roman father, who put his brave and successful son to death for disobedience to his commands, has never been called in question; though many have wished that the feelings of the father had softened, in that particular case, the stern severity of the judge.

None, however, will quarrel with the precept, though they may incline not to imitate the example. But even a mild and Christian philosopher, sitting in his own closet,

and studying an excuse for the breach of a military command, was after all obliged to content himself with an apology, in a possible, but single case, or rather, his ingenuity, being tasked, was unable to suggest any thing more than an expedient, and that perhaps, not altogether unexceptionable, which might plead for a suspension in the execution, not the supercession of a military order. To use the words of *Archdeacon Paley*—

" If the commander in chief of an army detach an officer " under him upon a particular service, which service turns " out more difficult, or less expedient, than was supposed, " in so much that the officer is convinced, that his com- " mander, if he were acquainted with the true state in which " the affair is found, would recall his orders, yet must this " officer if he cannot wait for *fresh directions*, without " prejudice to the expedition he is sent upon, pursue, at all " hazards, those, which he brought out with him."

The impression of this passage might be broken, but could not apparently be strengthened by any comment.

SECTION THE THIRD.

Of enlisting Soldiers.

THE course, which is to be observed in fixing on the individual the character of a soldier, and of absolving him lawfully from it, is pointed out in the two Articles which form the third section.

ARTICLE 1st.—This Article is directory, merely, and

an explanation of a part of the forms, ordered to be pursued, in the enlistment of soldiers, by the 89th clause of the Mutiny Act. It, in effect, prescribes, that every soldier, who enlists in his Majesty's service, shall, at the time of enlisting, or within four days afterwards, have the second and sixth sections of the Articles of War, respecting mutiny and desertion, read to him; and shall, within four days, and not sooner than twenty-four hours, be carried or go with some officer (or other person described in the Article), before some justice of the peace, or in foreign parts, where there is no civil magistrate, before the judge-advocate, and, in his presence, take the oath of fidelity (set forth in the Article); and that the justice or magistrate is to give the officer a certificate, shewing that all the forms, prescribed by the Act, have been duly complied with.

This Article refers to a recruit, who is willing to perfect the character of a soldier, having received the enlisting money—but does not convey any directions, in the other alternative, to which the clause also has relation, when the party enlisted is desirous, on reflection, not to complete his engagement as a soldier.

As the Articles of War are intended for the government only of those, who have actually become officers or soldiers, it may not have been deemed expedient to notice, in this Article, any of those provisions in the Mutiny Act, or perhaps, they may have been considered explanatory enough of themselves, which relate to the condition of those, who having proceeded to a certain extent in vesting themselves with some of the badges of the military character, nevertheless wish, under the indulgence allowed by the Act, to throw them off in due season. But as the Act has a highly penal operation on the neglect or offences of military officers, in the non-observance, or violation of its provisions, in respect to the latter description of persons, as well as

the former, a short account of what such provisions are may not be superfluous.

In the 89th clause of the Mutiny Act, which is introduced, as the marginal reference declares, for the relief of persons hastily enlisting themselves, it is provided, after the party enlisted shall have been carried or shall have gone before the justice or magistrate within the time and in the manner described in the Act, and as is specified in the 1st Article of this section, he shall be at liberty to declare his dissent to such enlisting; and on such declaration, and on returning the enlisting money, with twenty shillings in addition for the charges expended or laid out upon him, together with the full rate allowed by law for the subsistence, &c. &c. furnished to such recruit, subsequently to the period of his enlistment; he shall be forthwith discharged and set at liberty in the presence of the justice or magistrate; but if such person neglect, within the space of twenty-four hours, to return, or pay such money as aforesaid, he shall be taken to be enlisted, as if he had given his assent thereto before the magistrate. The 89th clause further provides for the case of a recruit, who, having received the enlisting money, afterwards *refuses* to take the oath of fidelity—empowering the recruiting officer to detain and confine such person, until he takes the said oath of fidelity. The clause also enacts, that "every officer who shall act contrary thereto, or "offend therein, shall incur the like penalty and forfeiture, "as is by the Act to be inflicted upon any officer for making "a false and untrue muster;" "to be levied and recovered "in the same manner, as any penalties and forfeitures are by "that Act to be levied or recovered."

If the 1st Article of the third section does not award any punishment for those offending against its letter, the clause of the Mutiny Act, just noticed, sufficiently declares the penalty, to which a breach of the Article may subject the

offender—which is no other than *cashiering*, and an utter disabling of such offender from having or holding any civil or military office or employment in his Majesty's service.

The policy of the 89th clause of the Act is not only to ensure the strict attention of officers to the recruiting of his Majesty's army, and to prevent abuses therein, to the prejudice of the service; but to protect the subject from being surprised into a hasty engagement, and to secure the renunciation of the engagement, if he wish to renounce it, within a reasonable time, and on easy and stipulated terms. The contravention of this policy, through the wilful act of any officer, will render him liable, as it has been shewn, to a most heavy punishment—and will operate as a disqualification of him for any official situation in future under the crown—and this after a most short and summary inquiry *.

By the 91st clause of the Act it is enacted, that persons enlisting, and concealing infirmities, or not declaring them at the time of the attestation before the justice, if they be afterwards discovered to be incapable of active service, may be transferred into any garrison, or veteran, or invalid battalion, or into his Majesty's marine forces, notwithstanding he may have enlisted for a particular regiment.

There are many other provisions in the Mutiny Act, on the subject of enlistment, extending from the 88th to the 106th clause; but as most of them have more immediate respect to masters, apprentices, and others, and their individual rights and liabilities as citizens, rather than as soldiers, it is not thought necessary to enter into any detail of them in this place; more especially as an occasion will arise hereafter of considering the parts of such provisions, so far as they have a tendency directly or indirectly to affect the military profession.

* See the observations on the 3d Article of the next section.

ARTICLE 2d.—This simply declares what shall be deemed, as to non-commissioned officers and soldiers, a lawful dismissal from the service; *videlicet*, a discharge in writing, under the signature of a field officer of the regiment or corps to which they respectively belong, or in the absence of a field officer, by the commanding officer present: and in the event of the regiment's serving abroad, the colonel of which being absent from *Great Britain*, by the adjutant-general to his Majesty's forces.

When once an individual is clothed with the dress and character of a soldier, he will remain to be considered as a member of the military state, and subject ever after to all the duties and responsibilities of a soldier, until he can shew his legal discharge; which it will be incumbent on him, whenever he may be called upon for that purpose, to produce, and under one or other of the signatures immediately noticed; or it will not be of avail.

SECTION THE FOURTH.

On Musters.

EVERY military establishment or expedition, depending on fixed and estimated strength, may be expected to prosper or fail, as the force relied on is complete or deficient; and as a large public expense always attaches to the maintenance of every military body, according to the numbers entertained; the direct interest of the State would suffer, as well as a consequential injury, in the failure of a military project, might follow, from the falling off of the numbers from the

estimate proposed and designed to be acted on. Hence the most strict rules have at all times been adhered to, for keeping up the regular calculated force of the country, correspondent with the estimate, and for the prevention of any failure in its amount, whether from negligence or other less excusable cause.

When the entire army, with all its equipments, was furnished, as formerly, on the private contract of individuals, who had a private and separate interest from the State, in the maintenance, or not, of the compliment of troops, which they were bounden to supply, a more rigid ordinance was requisite, than in later times, to prevent exaggerated statements by the individual contractors of their particular quotas of men, and of the military materials found by them. At this season, the musters of the army were accordingly frequent and severe; and the captains or *masters* of the troops, as they are almost generally called, were prohibited on pain of *reprobation*, and *loss* of *wages* for the *expedition*, to shew any other than their *own* soldiers, with *whom* they had *agreed**; and on conviction, or being *found faultie* a *second* time of the like offence, they were, in the simple language of the day—" to die for it †."

The Rules and Articles of War‡, in the time of *Charles* the *First*, were even more severe, subjecting in the *first* instance, a captain of a troop, who should present to muster any but real troopers, *bound* by their *oath* and *pay* to follow the troop, to the pain of *death*, " *without mercy*:" and rendering liable to the like punishment, any town or countryman, victualler, &c. &c. or soldier of any *other* troop or company, who should present himself or horse to muster— " to *mislead* the *muster*-master,"—" to *defraud* his Majesty,"

* Statutes of *Henry* the *Fifth*.

† Rules and Ordinances of *Henry* the *Eighth*.

‡ Articles of the *Earl* of *Northumberland*.

—" and to *betray* the *service;*" then and now the complicate mischief, flowing from false and fraudulent musters. The same ordinances declare it a capital offence, in a *muster-master*, to connive at this evil practice, and in a captain, lieutenant, cornet, ensign, serjeant, or corporal, who were then obliged to subscribe and swear to the truth of the list or muster-roll forwarded to the proper authorities, if they should be convicted of any falsehood in the premises, to which they subscribed. The like penalty attached to any person, who presented himself to muster under a counterfeit name, or surname, or false description of the place of his birth.

The heavy penalties, above enumerated, were not more, perhaps, than were needful to counteract the strong temptations to, and the easy opportunities of fraud, from the peculiar construction of the military force of the time, and the services on which it was employed.

When our army, subsequently to the Revolution, no longer consisted of private supplies, but of national levies, bearing under a parliamentary allowance, something of a stable character, it drew to it that constant and watchful attention of the legislature—and permitted, from this its new modification, a relaxation in the severity of the previously existing regulations, in the same proportion, as men's *duties* were detached, by the new arrangement, from the influence of countervailing *interests*, and as fresh vigilance was exhibited to the prevention of abuses; cutting off another principal encouragement to practices of fraud. The first policy, however, was retained, and has been persevered in ever since, though somewhat modified at different seasons. It is evinced in a statutory and sort of standing regulation, declaring, " that it is of essential importance as well as to the " due *observance* of *public economy*, as to the *discipline* of " his Majesty's *forces*, that they should be regularly mus-

"tered, and that the musters should be taken with the "strictest accuracy and exactness,"—and in various enactments and Articles of War, ordering a stated, regular, public, and solemn numbering of the troops of all descriptions; interposing checks against possible abuses in the taking of such numbers, and awarding proportionate and reasonable penalties and forfeitures, more likely, therefore, to be enforced, against infractions of the general or particular provisions.

Passing over the particular changes that have taken place in the regulations, for the furtherance of the declared policy of the law—it will be enough to state, that they have been moulded, at length, from the favourable experience of their effect, into a collection of simple and compendious rules, well adapted to the objects in view, contained under the *fourth* section of the existing Articles of War, now under consideration.

ARTICLE 1st.—Herein it is directed, that musters of the household troops, the regiments of the life, horse, and foot guards, shall be taken (in conformity with the provision contained in the 40th clause of the Mutiny Act), *twice* at *least* in every year, at the periods, and agreeable to the forms, to be appointed by his Majesty; and of every other regiment, troop, or company, in the king's service, at the times and in the manner prescribed by the late regulations, or any other, which his Majesty, according to his royal pleasure may think fit hereafter to establish, touching regimental and district paymasters, and the mode of mustering, paying, and settling the accompts of the army. The Article concludes with a requisition, or command, that all commanding officers and others concerned in the mustering, of both or either description of troops, should give the utmost care and attention, adopting here also the express policy, and

literal phraseology of the Mutiny Act, to the making up the muster-rolls "with *strict exactness* and *accuracy*;" as they will be answerable to his Majesty for their neglect.

The penalty, consequent on the neglect, is neither specified in the Article, nor in the Mutiny Act; but as all other penalties, not specifically declared, it must depend on the general discretion allowed to courts martial, governed by the circumstances of the case, and the customs and usages of war and the service.

ARTICLE 2d.—This Article refers to two distinct offences; one of them specifically declared by the Mutiny Act, the other, by the general concurrent authority of his Majesty over the body of the crime; the *first* is constituted, by the signing, *knowingly*, by any officer, of a false certificate, accounting untruly for the absence of an officer or private soldier from the muster,—the *second*, by the signing of such certificate in *blank*, as also of any returns or forms of accounts, before they shall have been filled up by the paymaster, or other officer or person concerned, with the requisite figures or accounts or circumstances, for which they purport to be vouchers.

The *first* offence is a *positive fraud* or *deceit*,—the *second*, an *implied* or *intended* one, perfected so far, as the instrumentality of the party, signing the false certificate or return, is necessary to the completion of the offence. If the crime fall short eventually, in any particular of its accomplishment, it will be owing, in every instance, not to the party originally signing the untrue vouchers or documents, but to the caution, fear, or perhaps a better motive, of the person having the ultimate control of the paper.

The latter species of offence may be as prejudicial to the public service, as the first, and in other respects would seem more aggravated in guilt; in as much as it argues a refinement of fraud, in endeavouring, through the artifice or

finesse of a *blank* signature, which may be afterwards used for any false purpose, as the convenience or interest of the holder may require, to evade the penalty attaching to a certificate, untrue at the time of signing it. If legal construction, regulated by narrow and straight principles in respect of legal crimes, can draw a distinction between a certificate given under the one or other circumstances, the eye of moral justice, owning no limit in its range, might not chance to discover any very striking difference in the two cases. To put the best possible construction on the latter act, it is the entire surrender of the honour or character of an officer, in a case, where the legislature, the country, and his chief commander, has imposed a confidence in him, to the keeping and disposal of another; evincing, if not a readiness to lend himself to the commission of a fraudulent practice, an utter insensibility and carelessness about reputation, which might lead, if not seasonably checked, not at once, perhaps, but by degrees, to the last and most base crimes.

To the *first* of the offences *cashiering* is absolutely awarded, on conviction before a general court martial.

A *conviction* on the *second*, as the article now stands, subjects the offender, which may possibly afford, in favourable circumstances, an opportunity for lenity in the judgment to be pronounced by the court martial, to the *liability*, only, of being cashiered.

It has been remarked, that the offence of signing *blank* certificates or returns, is declared solely by the Articles of War; and for the suppression probably, of a prevailing mischievous practice, which had sprang up since the declaration of the first offence, and its attendant penalty by the Mutiny Act. The crime declared by the Article must, therefore, be tried and punished, under the regulations of the Article, being the second of the fourth section. But the offence of signing a *false* certificate, is an offence as much

against the statute as the Articles of War, and is to be considered with reference to it, as well as the latter; a court martial being bounden, in all cases, not by the statute only, but by oath, to administer justice, according to the Mutiny Act*, as well as the rules and articles for the better government of his majesty's forces.

The 43d clause of the Mutiny Act is more particular in the description of the offence than the second Article of this section; the penalties, also, which it assigns to it, are more severe, and are awardable in a more summary way—and they are extended, too, to other parties, than are described in the Articles of War. By the statute, the *accessary*, as well as principal, are liable to the same punishment; the Act declaring it to be an equal offence in any one, who *shall procure* a *false* or *untrue* certificate to be made or given, as in him, who actually *makes* or *gives* it. Whether the purport of the certificate be to excuse the absence of a soldier from any other service, which he ought to attend or perform, or from *attendance* on *musters*, it is described to be in the same degree criminal.

The clause of the Mutiny Act makes not the same distinction, with the Articles of War, between a false certificate, *knowingly* or otherwise given; acting, as it may be supposed, on the presumption, that the party certifying is *bound* to *inform himself*, fully, of all that he is in duty called upon to certify, and if he be negligent in informing himself, or take any thing on *trust*, he cannot find any lawful excuse in his ignorance or misplaced confidence, being both in opposition to a plain and manifest duty; or it would be making the breach of one part of duty, which is contrary to every principle of right, a sanction for another.

It is to be noticed, that the certificate is rendered unavail-

* Twenty-ninth clause of the Mutiny Act.

able to the absentee, under the provision of the Act, except in the case of his being employed on some other regimental duty, or of his sickness, or being in prison, or on furlough; so that the *falsity* of the certificate may be taken, or the criminality of it at least judged of, with reference to one or other of these circumstances. Any other cause assigned for absence, not serving to, or affording not an excuse to the soldier, would not seem to fall within the intent of the statute, and therefore it may be concluded, would not subject the party offending to the extreme and accumulated penalties of the Act.

The punishment awarded to every offender, whether principal or accessary, by the 43d clause of the Act, is—that he shall *forfeit*, for every offence, the sum of fifty pounds, and shall be *forthwith* cashiered and displaced from his *office*, and shall be *thereby* utterly disabled to have or hold any military office or employment in his Majesty's service. It is not said, where and how the forfeiture is to be sued for or levied; but it must be supposed, in some one or other of the superior courts, from the paramount nature of their jurisdiction, and wherein the general forfeitures, declared by the Act, are directed to be sued for or prosecuted. A court martial has not authority to entertain a suit or proceeding to that effect.

When the *forfeiture* shall have been adjudged by a competent court, *cashiering*, from the strict letter of the clause, would appear, without any previous proceeding or form of trial, to be a necessary consequence; as much so, indeed, as a *disability* to hold any military office or employment in his Majesty's service, is an inevitable result, from the tenor of the statute, from the act of cashiering. The words of the clause, "*forthwith* cashiered," are so plainly expressive of the intent of the legislature, that the offending party shall be summarily removed and displaced from his office, on

the establishment of the forfeiture, as to admit not of doubt.

Though the Mutiny Act gives to officers as certain a possession in their commissions, as circumstances can admit, by ordaining or allowing that they shall not in general be deprived of them unless by the sentence of a court martial, or by the exercise of an extreme act of the prerogative, it has nevertheless on other occasions than here departed from particular considerations, from the usual course of its policy, by satisfying itself, as in the very next clause, with a very summary and *ex-parte* inquiry, differing most essentially from the proceedings usually observed in courts martial, as to the ground, on which it proceeds to order, and as it therein orders, an immediate cashiering; and in another case, as in the 87th clause of the Act, declaring an officer's commission null and void, without judicial investigation, from the mere circumstance of his refusal or neglect to satisfy the demand, after conviction, of the penalty adjudged, within the time limited by the clause in question*. So that one of the heaviest criminal punishments, that can be inflicted on an officer, from the effect of the law military, as it now exists, and

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* The 87th clause is made for the purpose of preserving game within the vicinity of the quarters of officers or soldiers, which briefly and in substance enacts,—that if any officer, without *leave* of the *Lord* of the *Manor*, under his *hand* and *seal*, shall take or kill game or fish, or other animals specified in the act, and be convicted thereof before any justice or justices of the peace, he shall forfeit the sum of five pounds for every offence; and every commander in chief, for every such offence, committed by any soldier under his command, shall forfeit the sum of twenty shillings: and if on conviction, and demand of forfeiture, by the persons properly authorized to receive it, such officer shall refuse or neglect to pay, within two days, the respective penalties, he is thereby declared to have forfeited his commission, which in consequence becomes null and void.—The forfeiture, and its consequences, according to the letter of the clause, attaches, as it should seem, as well to the commander in chief as the officer killing game without license, though there is a striking disparity in the two cases.

there can be no question of its existence, is made to depend on a determination, after a hasty inquiry, in a distinct and collateral civil proceeding.

ARTICLE 3d.—Two offences are embraced by this Article, having near affinity with one another.

First, the making, by any officer, *knowingly*, a false muster of man or horse.

Secondly, the signing, directing, or allowing to be signed, *willingly*, by any officer, commissary, or muster-master, a muster-roll, containing such false muster.

It would not be easy to mention all the acts that might be considered to constitute a *false muster*, but there are some, that have been frequently recognised by courts martial, which it may not be unfit to describe; such as the substitution, before the muster-master or other officer, in order that he may be entered on the muster-roll, of one man or horse for another, whether such man or horse belong to the service or not; the presenting of both or either a second time, under a different description, at the same muster; the mustering any person by a wrong name*; or of any person as a soldier, who in fact is not a soldier; or of returning officers or men *present*, when they are, in reality, *absent* from the regiment, or of returning them in the corps or company, after they are deceased, or have been discharged; for representing, as effective, boys or others, who from youth, infirmity, or some other disability, are declared, by the regulations of the service, as ineffective. These are some among the many acts which may be said to amount to a false muster.

The crime of signing the muster-roll, containing a false muster, though it hath some relation to the foregoing offence, does not necessarily participate in the guilt belonging to it;

* This, when knowingly done, is an offence against the 45th clause of the Mutiny Act, subjecting the offender on conviction to cashiering, and disqualifying him for all civil and military employment.

in as much as the signing of the muster-roll, might be an innocent act, if the party, signing it, had not any previous or personal knowledge of the fraud. It is therefore an indispensable allegation, in any and every charge of this offence that it be *wittingly* or *knowingly* committed; and proof must afterwards be adduced before the court, sufficient to satisfy it, that such previous knowledge existed, ere it can be authorized to pass a sentence declarative and punitive of the crime. As the party signing the muster-roll, containing a false muster, would appear to be an accessary merely after the fact; the acquittal of the principal on the charge, in which he is supposed to have been implicated, would operate one should think as a virtual acquittal to the accessary, and that he ought not afterwards to be put on his trial. The penalty in both cases, is the same: viz.—*cashiering*, and a *disability* on the part of the offender to hold any *civil* or *military* office or employment under the Crown.

When the penalty is statutory, it is unnecessary almost to remark, that the sentence of a court martial, in the event of the charges, to which it relates, being proved, must be conformable to the statute, or it will be naught; for, in such cases, the deliberative functions of the courts cease with the finding of the facts. All other acts of the court, *after* this, are ministerial merely; the sentence to be pronounced, being the *sentence* of the *law*, and not of the *court*; the former borrowing, as it were, the voice of the latter to pronounce its judgment.

It has, however, happened, which has led to the immediate observation, that courts martial have sometimes taken on themselves to vary the penalty, affixed by the statute, from a supposed favourable and distinguishable feature in the crime, taking from it a part, as conceived, of the legal, as well as moral guilt attached to it. There is an instance of this in the sentence of a naval court martial passed on *Captain Coffin*,

on a charge of false muster. The penalty attaching to the offence is the same in the naval, as in the military Articles of War. The court in this case finding the fact, but negativing the fraud either in intention, or in effect, adjudged the prisoner not to be cashiered, with other attendant penalties according to the 31st naval Article, but to be dismissed his ship.

The Admiralty, thinking the above sentence, as it undoubtedly was, according to the 22d *George* the *Second*, on which the 31st Naval Article is founded, illegal and defective, undertook of themselves to render the sentence more conformable to the act, by striking *Captain Coffin's* name from the list of the navy; being tantamount to cashiering. That officer addressed his Majesty in council thereupon, setting forth the particulars of his case; and his memorial was submitted to the opinion of the twelve judges, who reported the sentence of the court martial to have been illegal; and that the punishment directed to be inflicted by the act, on persons convicted of offences specified in the 31st Naval Article, could not be inflicted by any other authority, than that of the court martial, which tried the offender*.

Now the illegality of the sentence consisted in its variance, in the penalty assigned by it, from the direction of the act: and such illegality will arise, in every case, where there is any departure, no matter what it be, from the letter of the penalty, which the law has thought fit to assign to any particular crime. The original jurisdiction of the court over the offence itself, and all others, arises out of the power of the legislature, which must be as authoritative on the sentence, when it chooses to prescribe what it shallbe, as on all other the proceedings and incidents of the trial.

The latter branch of the report of the learned judges

* This case is quoted more at large in Mc Arthur, on Naval and Military Courts Martial, 2d vol. p. 290.

shews; that if there be a defect in the original sentence, that none can cure it but those who passed such sentence; that no authority, however great, can interfere with the judgment of a court of justice, though it be for the purpose, certainly a specious cause, of making it correspond with the known intention of the law.

The precedent, just alluded to, is taken, as it has been observed, from the proceeding of a naval court martial; but it is applicable in all its circumstances, to sentences that may be passed by a military court: and it is chosen in preference of any other that may have occurred in the latter courts, from the weight of authority, that must attach, in all points of law, to the opinion of the judges of the land.

It has also happened, that a court martial, having before them evidence of the fact of a false muster, have repelled the idea of guilt, deducible from the fact, from an impression that the accused could not design any fraud, nor have any discernible interest in the practice of it. An instance of this kind occurred, on a general court martial held at *Chelmsford*, towards the end of the year 1811, on a paymaster of the *Surrey* militia; for a charge of false muster "in reporting an "officer *present*, who was *absent* from the regiment." The sentence of the court was of the following tenor. "The "court being of opinion, that the charge has no foundation "but in error, and that the prisoner could derive no advan-"tage, or have any sinister view in such unintentional mis-"take, does acquit him of the said charge."

In adverting to the finding of the court, the *Prince Regent* observed, in expressing his acquiescence, and at the same time the extreme surprise, which his Royal Highness commanded to be made known to the court martial, that the sentence was so inconsistent with the nature of the evidence, that his Royal Highness would have ordered the return of the proceedings for revisal, were it not for an intention (which

was afterwards acted upon) of calling for an investigation into the general state of the regiment.

It may be observed that it is no component, or integral part of the offence charged, that the accused may derive an advantage from the false muster. It is enough to constitute the crime, that the muster be actually false, with the knowledge of the party making it. The mischief intended to be prevented by the law, is a false statement of the numbers or circumstances of the king's forces, which is or may be alike detrimental to the public purse and his Majesty's service, as it may be dangerous in point of example; and this mischief would be the same, whether it were occasioned by negligence or inattention, or open or concealed fraud. A denial therefore of motives, which might or might not be implied in the offence, cannot afford any legal excuse for it.

The act, it is true, might be more aggravated, if it had been accompanied by the motives negatived, but as it is of itself, without any special quality assigned to it, a prohibited crime, it is not the less so, from the absence of motives that might have given it a viler character. An act prohibited has a quality necessarily cast on it. It is criminal on the face of it; and cannot be changed in its nature from the motive with which it is committed. No one is allowed to do evil, that good may come of it; or to assign a particular excuse for an act, which under general or any circumstances, is declared to be unlawful. It would therefore be no justificatory plea to a charge of a positive and prohibited crime, to say, allowing that it was capable of common proof, that it was done with good and honest intentions. Besides, what earthly tribunal could be judge of intentions, if they were pleadable? It would be too much to expect, that they should be believed on the credit of the allegation of the party accused, either before or after accusation; for the one might

be in anticipation of a defence; and the other in avoidance of punishment consequent on conviction.

But circumstances, appearing on the trial, that may be thought by the court martial to diminish or palliate in some degree the guilt of the offence, though they cannot operate, for the reasons explained, on the sentence to be passed by the court, may yet be noticed, and on all fitting occasions with a suitable effect, to another quarter, where a power is wisely left by the Constitution to abate the rigour of the law, and which none else can exercise.

At a general court martial holden at the same time and place, with that last mentioned, on *Major P. Thompson*, also of the *Surrey* regiment of militia, for a variety of charges, resolving themselves, for the most part, into cases of false certifications or false musters; the court having gone through the investigation of the charges, and having found the accused guilty of several of them, but under many favourable modifications; such, among other things, as that the men, falsely certified on the muster rolls, had been returned on the effective strength of the regiment, in compliance with a long-established custom, sanctioned by officers of superior rank, and from a conviction in the accused, that he was authorized so to do; and in one instance, by the express direction of the colonel, and in all with his knowledge and approbation: and in other instances, that the false certificates had not been knowingly or wittingly granted; and in the false musters made by him, he had *not* been actuated by any bad motive or intention; and having thus gone through, one by one, the whole range of the charges, the court arrive at the final sentence, which runs in the following words:

"The court do therefore adjudge the prisoner, *Major* "*Peter Thompson*, of the 1st Royal *Surrey* regiment of "militia, to be *dismissed his Majesty's service*. But they feel

" themselves obliged, with the greatest regret, to pass this " sentence on the prisoner, in compliance with the Articles " of War, as they conceived that he erred unintentionally, " and that he had no design to countenance, or even per- " mit, any practices injurious to the interests of the soldiers " under his command, or prejudicial to his Majesty's ser- " vice; they also beg leave most respectfully to submit for " the gracious consideration of his Royal Highness the " Prince Regent, the length of confinement the prisoner " has undergone (in itself no small punishment), the disap- " pointment he has experienced in his trial, being so often " deferred to make way for those of officers of inferior rank; " the number of years (fifty-four) that he has been in his " Majesty's service, during which period he has conducted " himself with honour and credit, as appears by the testimony " of several officers of rank and distinction to his hitherto " irreproachable character; they do, therefore, recommend " him most earnestly to his royal highness's clemency."

To which recommendation of the court martial, the commander in chief communicated his Royal Highness the Prince Regent's pleasure, at the time, of confirming the sentence— " I am commanded (says his Royal Highness) to acquaint " your lordship, that it is a subject of serious regret to the " Prince Regent, that an officer of *Major Thompson's* great " age and respectable character, should have countenanced " transactions so highly injurious to the interests of the ser- " vice, as those which have appeared in evidence, upon the " face of the proceedings; and though it would be gratify- " ing to is Royal Highness to give *full* effect to the recom- " mendation of the court in favour of so old an officer, yet " a consideration for what is due to the good of the service, " interfered with his Royal Highness's disposition to extend " his entire forgiveness to the prisoner; but as the Prince " Regent is willing to believe, that the several offences de

" scribed in the charges had rather arisen from the culpable
" and improper conduct of other officers, to which the prisoner did not sufficiently turn his attention, than from any collusion or personal participation in those offences, his Royal Highness was most graciously pleased to command, that the prisoner, *Major Thompson*, should be released from the severity of the sentence, by which he is " *dismissed his Majesty's service*," and that the same should be substituted by—*removal from the 1st Royal Surrey regiment of militia*."

The sentence of *dismissal*, according to the modern military acceptation of the word, is not co-extensive in its operation with that of *cashiering*, implying no disability for future employment in the service, as the latter does. The sentence, here, as on all charges of a like nature, should have pursued the letter of the Articles of War, by adjudging the offender, in express terms, to be *cashiered*; inducing all the penal consequences intended by the Mutiny Act.

The mode of prosecuting the offences, under the direction of the Article, is most simple and express: *i.e.* by the bare adduction of proof, by the mouths of two witnesses, either of the fact of the false muster, or of the signing, directing or allowance of the muster-roll, comprising it; before a general court martial.

Though the proof, to which the penalty attaches, is required to be exhibited, through the medium of a general court martial, it sanctions not the idea, from that single circumstance, that the party to be affected by the penalty, is entitled to the benefit of a full and complete investigation and defence, before such court, as would prevail in matters of charge, on military complaint in ordinary prosecutions. The Article, on the contrary, contains not a word, warranting any other proceeding, than the mere exhibition of the proof of two witnesses of the facts constituting the se-

veral offences. The court martial are put here, it seems, in the place of the justice or justices of the peace, to whom is given a summary jurisdiction over several of the matters specified in the Act, possibly from their apparent knowledge of what, by military custom and usage, might be deemed a false muster, or a fraudulent muster-roll.

If any further explanation were wanting, to shew, that the Article intends a prompt and extraordinary proceeding, the Mutiny Act supplies it, by the manner in which it directs the assembling of the court, and the authority with which it arms it for the particular purpose, quite distinct from the general purposes for which it had armed courts martial previously—by communicating to them a full and complete power in all direct and incidental matters that could come judicially before them; so that the *proof* to be exhibited here cannot be holden to be in the course of an ordinary proceeding.

To take the required proof, it is expressly provided by the 44th clause of the Mutiny Act, that a court martial shall be summoned *thereupon*; that such proof shall be adduced on the oath of two witnesses—and that the court shall have authority to administer the oath; and having the proof thus before it, the party, implicated by such proof, shall be, by the mere operation of the law, and not by any act of the court martial, *forthwith* cashiered. For thus speaks the Act:—"Upon proof thereof (namely, of the false muster by "any officer, or the signature of a false roll by any officer, "commissary, &c. &c.) upon oath made by two witnesses be-"fore a general court martial, to be *thereupon* called "(which is *hereby authorized*, and required to *administer* "such *oaths*), shall for such offence be *forthwith* cashiered, "&c."

From the tenor of the Article and the Mutiny Act, the duty of the court martial is strictly confined to the tender of

the oath to the witnesses, and receiving their testimony as to the commission of the criminal acts; these must be verified, by the oaths of *two* witnesses, at least. After receiving the proof, which is declared by the statute to be sufficient evidence of the crime; the court martial are not called upon by the Article or the Mutiny Act, even, for a sentence; the penalty attaching, on the exhibition of the required proof. The security of the party, to be affected by the proof, is in the penalty attaching to the witnesses, on the event of their being perjured; as in all other cases of *ex-parte* convictions.

It must be observed, in this place, that although the plain and obvious course of proceeding, and the punishment of the offences under consideration, is, as explained, clearly designated both by the Mutiny Act and the Article of War; it has nevertheless been the practice of courts martial, perhaps on an equitable construction, which they may have conceived themselves at liberty to put on the 44th clause of the Mutiny Act and the Article having reference to it, to take the proof required thereby, after the ordinary manner of their judicial proceeding; a mode which has been favoured by the common practice, obtaining, in the public prosecution of these offences, in bringing them before a court martial, on formal and specific charges, the daily subjects of cognizance with such courts.

When the charges have been thus preferred, the court has exercised on all occasions an entire and complete jurisdiction over the matters contained in them, as of common concern; hearing witnesses, on both sides, after the usual manner of examinations, on chief and cross interrogation, and ultimately proceeding to give their judgment in the premises, as the case has appeared, on the whole, to demand.

When the end of such a process is to effect substantial justice, and by a more formal course than is directed by the law, no one would be over nice, in examining, whether

the jurisdiction so assumed by the court martial strictly belongs to it or not. The whole proceeding rests, from the view that has been taken of it, on the consent of the court and the parties; and none of those parties, it should seem, whatever might be the legal consequence, could have reason afterwards to complain of the incompetency of the judicial act. But as the public and military community cannot be bound by the acts of others, they will be at liberty, to avail themselves of the election, either of following the practice adopted by public prosecutors, and allowed by the military court, in itself a most considerate, liberal, and humane practice, consonant to the general and generous strain of British judicature: or will pursue a narrower path, if they be so minded, which is pointed out by the rugged letter of the law.

The usage of the court martial, it is presumed, would be no estoppel, if pleaded, to an *ex-parte* procedure to conviction on the clause of the Mutiny Act, or the Article of War, for they are in substance, in this respect, the same; for though it be entitled to great weight, in point of example, it is of no authoritative force in legal consideration; so as to countervail the general operation of the law. There is no possible compromise of the latter—no renunciation of the right of the public, by the acts of individuals; and most certainly no interpretation of a statute, when its provisions are clear, by the sense or judgment of individuals, as to its expediency or equity. If the law be plain, it is and must at all events be obeyed to its very letter; no power, less than that which made the law, can vary or dispense with its provisions.

Many reasons might induce to a legislative regulation, as here, which in time might be forgotten, when the policy of it would cease to be recognised; but so long as the regulation endures, its policy, however unseen, must still be pre-

sumed. It would not be a matter of difficulty to advert to the principle, on which the law has ordered a summary remedy in this case; but it would be presumptuous to offer an excuse, where none can or ought to be required.

Having already expressed an opinion on the practice, obtaining in courts martial, on charges preferred on this Article, I would leave such practice, with the merits so observable about it, to make its own impression with the legislature, be that what it may; whether it lead to the confirmation of its first provision, in all its strictness, or to the sanction of the latitude, given to it, by the liberal construction of the military courts.

ARTICLE 4th.—This, like the last Article, is founded on the 44th clause of the Mutiny Act, and subjects any *commissary* or *muster-master*, on conviction by a general court martial, of having received any money, by way of gratification, on mustering any regimental troop or company, or on signing the muster-rolls, to displacement from his office, and to the other penalties, attached to the offence by the Mutiny Act.

The Act goes further than the Article, rendering every other officer, who shall receive a gratuity, in either of the specified cases, liable to the same penalties, with the commissary or muster-master.

The very receipt of money, for the performance of an act of duty, connected with the office of the person executing it, is contemplated, here, as a political, if not a moral offence, having or being calculated to have an influence on the party receiving it, adverse to the due discharge of the obligations of his office. It is to prevent a temptation to crime—so that if the money be received, no matter with what view on the part of the person receiving it, or what effect it may afterwards have, on the muster, or on the signing of the rolls, the offence in the eye of the legislature will

be complete; and the offender liable to the prescribed punishment. The taking of the gratuity is the act prohibited; and it is of itself the sole offence. No question can mix itself, therefore, in this case, with the simple proposition, whether money was received or not. For false musters, and signing false muster-rolls, are crimes of another and separate kind, and had been fully guarded against by the preceding Article.

The offence, here, may be prosecuted in the like summary way, with the offences mentioned in the foregoing Article, under the 44th clause of the Mutiny Act,—and is exposed with them, on the same proof as required in those cases, to one and the same punishment. All that has been observed in the former instance is therefore applicable to this.

In pointing out the different modes by which the remedies for the offences described in the three preceding Articles of War, may be pursued or enforced, I have not been led away by the desire of seeking a new construction, of which the Mutiny Act or Articles of War, in reference to it, may possibly admit, in a vain exertion of any supposed ingenuity in the discovery; much less by an intention, which would be far less excusable, of devising novel ways for the prosecution of an honourable body of men, for occasional lapses, or aberrations from their duty, from which none are exempt; but with the better view, as I would hope, of warning them of the dangers to which they are, in my humble apprehension, exposed, and of guarding them, where the effect of inattention might be very fatal to their professional views, if not to their honour, against a *possible* surprise. It is enough for the justification of the foregoing remarks, that the danger *may* happen; not that it *must*.

The usage of the army, and the practice of courts martial, founded, as they have been shewn to be, on the most liberal

principles, may be thought sufficient protection against summary convictions, on the Mutiny Act or the Articles of War, at the instance of the members of the military community; but that security may be considered frail, which depends rather on the forbearance or indulgence of individuals, than on public obligation; and there is not even the force of a liberal example, to influence the conduct of men in civil life, who are altogether unacquainted with military customs, so as to prevent them for suing for the forfeitures, awarded by the Act, by the strict process which the law allows, and which might induce, as I have shewn, and which might otherwise have escaped the notice of the party to be incidentally affected by the forfeiture—the consequential penalties, of loss of commission, and of general disqualification for office. If the preceding remarks shall serve to put a single officer, under unfortunate circumstances, on his guard, and thereby draw his attention to the point of attack, against which he might not have sufficiently prepared for his defence, not perceiving the dangers with which it might be attended, they call for no apology, while they may have even an useful effect, if they chance to engage the notice of those, interested in the office of legislation, and direct their care, in the revision of the Mutiny Act, to clauses of the statute, bearing on these offences, so as to render them free from any verbal obscurity in their directions, as to the crimes, the punishments, and the mode of proceeding in respect of them, if not to make the latter conformable here to the course usually adopted in the prosecution of the common offences declared by the Act; or, which would be no slight advantage, if they be the means of recommending some attention to the construction of the Articles of War, contained in the fourth section; to reconcile them, where they would appear at variance, or at least not

in conformity with the letter of the Mutiny Act, which may otherwise give rise to doubt and inconvenience.

ARTICLE 5th.—The Regulations, respecting the granting of furlough, or temporary leave of absence to soldiers, and the extent of it as to time and the numbers, to which it may be occasionally allowed, are specifically laid down under this Article: they are clear in themselves, and require not a word in explanation of them.

These permit the colonel, or other field officer commanding a regiment, troop, or company, to give furloughs to soldiers, in such numbers and for so long a time, as in his discretion may seem meet, consistently with the good of his Majesty's service; but restrict a captain, or inferior officer, in granting leave of absence to a soldier belonging to his troop or company (a field officer not being present), of more than twenty days' extent*, in the course of six months; or to more than to two private men at one time.

There are no rules laid down in this section, respecting the leave of absence, that may be occasionally granted to commissioned officers. The Regulations on this head are to be found in another place†, being regarded more as a

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* Furloughs in these, and all other cases, may be extended by the 114th clause of the Mutiny Act, to a certain limit, and under certain provisions, in the event of the sickness of non-commissioned officers, or other unavoidable casualty, happening to them, before the expiration of such furloughs, by the inspecting field officer stationed on the recruiting service on the spot, or any officer there of the rank of captain, or of superior rank, or adjutant of local militia within the district; or in the absence of such officer, by a justice of the peace. By the next clause of the Mutiny Act, the justice of peace is empowered to make an order on the parish officers for money for the pay of the soldier whose leave may be thus extended: the advance to be after the rate of *eightpence* per diem, as fixed by a general regulation at the Horse Guards, 31st December, 1813.

† The principal regulations on this subject are to be found from page 51 to 59 of the *General Regulations and Orders* for the army.

matter of internal arrangement, than of public or legislative enactment.

The above are the only Articles, included under the fourth section; but they contain not the only provisions against offences, that might counteract or obstruct the due taking of the musters of the king's forces; nor are they the sole means resorted to by the legislature for giving effect to its own policy.

The 45th clause of the Mutiny Act subjects any officer or commissary, on conviction before a general court martial, who shall knowingly muster any person by a *wrong name*, to such penalties, as are inflicted on those, who *make* FALSE MUSTERS.

There are certain clauses, of which it may be proper to make some mention, which prescribe that all musters be taken with great publicity and multiplied solemnities, evincing a most zealous caution against abuse: and others, operative on the subjects in general, as well as soldiers, who may aid in practices, elusory of the provisions of the Mutiny Act.

Seeing that in towns of so large a population as the city of *Westminster* and borough of *Southwark*, and their respective liberties, frauds might be more easily practised in respect to musters, than elsewhere, the 41st clause enacts, that no muster shall be taken within such places, without a previous notice, of forty-eight hours, be given thereof to six justices of the peace, residing within the limits of the said city, borough, or liberties, and without the attendance of two or more of them, not being officers of the army, at the time and place of muster; or on the non-attendance of the justices, if the commissary, as he is authorized by the Act, proceed

to take the muster by himself, then he is required to make oath, before other of his Majesty's justices, within forty-eight hours after taking the muster, of the fact of his having given due and lawful previous notice to the local magistrates, and obtain the signature of such other justices to the muster-rolls; who are empowered to examine into the truth of the muster, before they sign the rolls. The commissary, who musters any regiment, troop, or company, otherwise than is directed by the clause just mentioned, is rendered liable to a penalty of fifty pounds, and of being discharged from his office.

To prevent delay, which might afford an opportunity of abuse, in taking the half-yearly muster, or any alteration in the muster-rolls, after they shall once have been closed, the deputy or deputies of the commissary-general, are directed by the 47th clause of the Mutiny Act, to close the muster-rolls, relating to the muster of troops, taken at or beyond ten miles distant from *London*, within twenty-four hours after the taking of the muster; and to return the rolls, so closed, to the office of the commissary-general of musters, within a week from the time of their being closed; and the latter officer is required to transmit, at a day appointed, three sets of the said muster-rolls to certain officers named also in the Act. The clause finally enacts, that no alterations or indorsements shall be made in or on the muster-rolls, except in the cases of orders of leave, or dates of commissions, or of involuntary errors, namely, literal mistakes in writing or transcribing the muster-rolls, on pain of forfeiture of their respective employments, and of twenty pounds, for every offence, to any person that shall sue for the penalty.

The enactments, immediately noticed, apply to persons holding official situations in or related with the army, and have in their view, through the regulation of the conduct of

officers, in mustering of the forces, the prevention and detection of frauds. The precaution of the legislature does not stop, with the declaration of provisions, for checking and punishing the evil practices of principals, but is particularly exhibited in a very strict clause against persons, not connected with the army, who may be aiding in or accessaries, in any manner, to false musters, either of men or horse; so as to defeat the wholesome purposes of the statute.

The 46th clause enacts, that if any person shall be falsely mustered, or offer himself for that purpose, he shall, upon oath thereof made by two witnesses before any justice of peace of the county, near the place where the muster is taken, and written certificate of the commissary or muster masters, be committed to the house of correction for the space of ten days: and if any person, being the owner of a horse, shall wittingly lend him to be falsely mustered, the horse shall be forfeited to the informer; or, if he be not the owner of the horse, he shall forfeit 20*l.*, on oath made by the like number of witnesses, and before the like justice, as in the preceding case: the forfeiture to be levied by distress and sale of the goods and chattels of the offender, or in defect of goods and chattels, or failure to pay the penalty within four days after conviction, the justice of the peace shall commit the offender to the common goal for three months, or cause him, at discretion, to be publicly whipped; the forfeiture to be paid to the informer, who, if belonging to the service, is entitled, on demand, to his discharge.

It might, perhaps, prove a more effectual remedy of the evil provided against in the first part of the 46th clause, if the person lending himself to be falsely mustered, should be held and deemed, from the bare fact of his enrolment, to be, to all intents and purposes, a soldier; making the artifice, intended against the state, retaliate on the offender's own head; and

prove the substantial means of supplying the real defect, over which it meant to throw a cover*.

SECTION THE FIFTH.

Returns.

THE Articles contained in this, are governed by the same policy with those comprised in the last section. But here, in contradistinction to those of the preceding section, they originate purely from the crown, in the general exercise of the high military prerogative, inherent in it, to make the law, in any new and unprovided case, as it shall see fit, for the better government or discipline of the forces. The Articles have in view, by the means of clear and plain directions, and the assignment of suitable punishments to those who may act in neglect or disobedience of them, the enforcement of true, regular, and stated returns of the numbers and condition of the king's forces and stores; wherein misinformation or a misunderstanding of the real state of the troops and their equipments, might be attended with the most ruinous consequences.

ARTICLE 1st.—A false return, knowingly made, to the king, or to any superior officer, either of the state of the regiment, troop, company, or garrison, under any officer's command; or of arms, ammunition, clothing, or other stores, thereunto belonging, is declared by this article, to be an of-

* The legislature acts precisely on this principle, in respect to persons surrendering themselves as deserters, or, on being apprehended, confessing themselves as such—deeming them, in both instances, from their *own* act, duly *enlisted*; whether they be actually enlisted or *not*. 111th clause, Mutiny Act for 1815.

fence; subjecting the person committing it, on conviction before a general court martial, to be cashiered.

The returns, contemplated by the Article, are of a general nature, such as a superior officer is authorized at any time to call for, and an inferior to make; and include almost every head, on which officers in charge of the extraordinary as well as ordinary departments of the army, may be required to report. They are contradistinguished from the monthly returns, which refer only to the state of the corps or force, under the charge of a particular commanding officer.

It is no matter in what the falsehood of the returns may consist, whether in the number or quality of the troops, of which they purport to be a true account, or of the arms, ammunition, clothing, or stores; as circumstances of inefficiency might be equally prejudicial to the service with those of positive defect; or whether the deficiency arise from a fixed or occasional cause, as from the temporary absence of men or arms, &c. &c. It is the duty of every officer to return things as they are.

The crime will be complete, if the returns be not true, with the knowledge of those interested in making them, in any one particular represented; the materiality of which cannot come to be considered under a general regulation, touching *all* returns, if they be false in their representation. All military acts and operations must be undertaken on a confidence in such returns; and therefore any deceit discovered in them, as it might essentially affect any military plan, is visited with a severe and immitigable punishment.

The only inquiry that can arise, under any charge founded on this Article, is whether the returns, in question, are false or otherwise; and next, whether the party, making the returns, is apprized, at the time of making them, of their being false. On the latter branch of the inquiry, it may be remarked, that an officer will always be presumed to know,

what from the duty of his office he is bound to know, or ought to inform himself of. So that ignorance of the contents of the returns, subscribed by an officer, cannot be pleaded in excuse, for it was his business previously to inquire, as it will be in all cases, where his signature is not merely formal, into the truth of the statements made in them; otherwise, the returns might as well have been signed in *blank;* which has been shewn to be a serious offence, under the 2d Article of the last section.

ARTICLE 2d.—The preceding Article concerns every officer, whatever may be the branch of the army in which he may serve; and on whatever subject he may be required to make returns, while the present relates to *commanding officers,* only, touching the bodies of men under their immediate orders. The last Article, for the most part, respects the subject matter of the returns; this more particularly, though not solely, the time, or regularity in the making of them.

Commanding officers are enjoined by this Article to transmit an exact state of the troops under their command, on a certain day in every month (the *twenty-fifth*), to the commander in chief and secretary at war, with a particular statement as to the officers, belonging to such troops, who are non-resident at their posts; which statement is to specify not only the names of the absentees, but the reason for, and the time of their absence*. It is the principal object of the Article to enforce the presence of officers with their corps, as well as to guard against absence, in any case, except on known, well-authenticated, and reported grounds. Hence it is, that the returns are ordered to be made at quick-revolving periods, and in specific terms; and any failure in the trans-

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* For further particulars relating to such returns, see the General Regulations, pages 259, 260, and for special forms, in certain situations, see from page 263 to 268.

mittal of them to the proper authorities, either through design or neglect, is liable to be punished, on conviction, at the discretion of a general court martial.

ARTICLE 3d.—Returns of troops in *Ireland*, are directed by this Article to be made, in like manner, as in the foregoing Article, to the lord-lieutenant, or chief governor or governors, and to the local commander of the forces; and of troops in *North Britain*, to the officer commanding, there, in chief; to be by them respectively forwarded to the king, and as best suitable to his Majesty's service.

ARTICLE 4th.—This Article contains directions for the returns respecting troops, stationed at *Gibraltar*, and garrisons elsewhere abroad, ordering that they shall be transmitted to the secretary at war, to be laid before his Majesty.

SECTION THE SIXTH.

Desertion.

THE provisions under this head apply generally to those, who, being duly enlisted and enrolled, may afterwards desert, or temporarily absent themselves from the king's service; to officers, who knowingly receive and entertain persons, so deserting, or who, on discovering them, do not confine them, and give notice to the corps, to which the deserters last belonged: and lastly to officers and soldiers, who may advise or persuade others to desert.

The Articles relating to these different species of offence, are few in number, and short and concise in their letter; being neither so full, nor descriptive in what they ordain, as

the clauses of the Mutiny Act. To obtain a tolerable knowledge of the offences, ranging themselves under this head, and the punishments awardable to them, it will be absolutely necessary to refer, on all occasions, to the Act, by which they are created.

It will not be altogether out of place, as the Mutiny Act and Articles of War are equally silent on the subject, to give a short definition of the principal offence, though it may be supposed, to be familiarly known and understood.

Desertion, generally speaking, may be said to be a wilful abandonment or departure by any officer or soldier, of or from his station, regiment, or corps, without *leave*; and without the *intention* to *return*. It is the latter circumstance, which constitutes the difference, and which is to be judged of by the particularities of every case, falling directly under decision, between desertion and absence without leave. The heavier and more heinous crime of flying from the colours, or the field, in time of battle, is not here under consideration.

A rule could not well be laid down, which should describe with accuracy either the length of the unlicensed absence, or the circumstances attending it, which would be conclusive of the offence. Absence, by itself, if continued so long, as to exclude the reasonable idea of a meditated return, might, if unexplained, or unexplainable, be deemed desertion. A number of circumstances, also, joined with the shortest possible absence, might be taken to be declarative of the crime, in its full extent. Such as, if the absentee should be found on board a ship in the capacity of a sailor, or as a passenger, bound to a distant country; or in a coach, having engaged a carriage to a remote spot; or being discovered in a disguise, having entered into a contract, incompatible with, or which would necessarily detach him from his duty or attendance as a soldier; or letters or writings be found upon him,

shewing a previous purpose to separate himself from his regiment or corps; or if he should enlist or offer to engage in a new service.—Any one of these circumstances, with the slightest absence from the place in which the party ought to have been found, would be *primâ facie* evidence of the crime. On the other hand, if he should not have stripped himself of his regimentals, or removed any great distance from his quarters, or have left any articles of value, easily removable, behind him; or be discovered in the pursuit of some accidental temporary object, though perhaps, otherwise illicit; a short absence coupled with any of these acts, or others of a similar nature, would not appear to indicate that he intended to sever himself from the service; and more especially, if he had made any motion or shewn the least inclination to go back to his post.

It has been observed, that the *animus revertendi*, or the *mind* to *return*, is the strong feature or the line of demarcation, between the primary and secondary offence, described in this section. And this *mind*, is in all cases to be collected from the acts of the party, and the construction which the court martial may put on them, and not from the accounts which the accused may choose to give; his motives being known only to himself.

Considering the heavy punishment that deservedly attends the crime, military courts have been disposed at all times to consider every circumstance in a most favourable view, that tends to discover any thing like an inclination in the offender to return to his duty: and have formerly carried this disposition so far, as not to think the crime complete, where its consummation has been prevented, by the restraining hand of the law, rather than by the evidence of a returning sense of right in the breast of the offender. Thus one apprehended in the act of flying, and before he had attained the place which he meditated in his flight, is brought back,

without resistance, to the camp,—has not been considered in the more serious light of a deserter: whilst he, found and taken in a town, or city, remote or separate of course from the field and brought back unwillingly into the camp, has been holden to be a criminal of the highest degree*.

There are cases, in which the court martial is precluded from entering into the question of intention, the law having positively pronounced respecting them, and declared them to be acts of desertion. Among these is the act of an apprentice, who, having been enlisted, on a representation that he was not an apprentice, shall not deliver himself up to some officer authorized to receive recruits, at the expiration of his apprenticeship †.

In this instance, even, it may be open to the court to consider, whether there was a reasonable time for the party to deliver himself up, and which he did not avail himfelf of, between the interval of the expiration of his indenture and the time of his apprehension.

The enlisting into another corps, without a lawful discharge from the first, is a virtual desertion, under the second clause of the Mutiny Act: and so absconding from a recruiting party, in the space of four days, after receiving the enlisting money ‡.

Desertion, at all times, and in all countries, has been classed in the first rank of military crimes; and has been punished in different ways, more or less severe, according to the genius or the policy of particular governments, with a view to the sentiments of the people. Some of those pun-

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* So Upton, *de re militari*, p. 30. " *Emansor* est, qui vagatus a castris, " ad ipsa reducitur. *Desertor* est, qui *invitus* ad castra reducitur, qui si in " *urbe* invenietur, capite punitur." And he adds—" *Alibi* tamen si ex " primâ desercione captus, iterato deserat, capite punitur."

† 95th clause Mutiny Act.

‡ 90th clause of the Mutiny Act.

ishments have been more remarkable for their caprice, or singularity, than any apparent wisdom. But in most States, a distinction has been made in the offence, when committed, and consequently in the punishment allotted to it, in time of peace. Our statute law has ever favoured such a distinction*.

Of *desertion*, in the strict light in which it is here considered, little, if any mention is made, in the old Rules and Ordinances of War. The crime was either not so common formerly as now, or it might have been submitted, almost exclusively, to the correction or punishment of the civil tribunals. From the time of *Henry* the *Sixth* to the present day, the civil courts have been vested with a complete jurisdiction over the offence, though it has not been exercised for so long a period, that it may be spoken of now as a matter of history, rather than as of a surviving or existing institution.

From the date of the first Mutiny Act†, desertion has been declared to be an offence, punishable with death, without any reservation as to the season wherein the offence may be committed, whether of peace or of war; but it has at all times been left to courts martial, to award the extreme penalty, or any less punishment, at their discretion, according to the circumstances of the case. If the law, in the possible extent of its operation, may be considered by some as too rigid, the actual administration of it by military courts, may by others be thought too indulgent; for an instance can hardly be named, where the capital sentence has been executed for a single act of desertion, unaccompanied by other serious crime. The courts, exercising with humanity the authority imposed in them, have adopted the policy of the

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* 18th *Henry* the *Sixth*, c. 19.—2d and 3d *Edward* the *Sixth*, c. 2,—and 5th *Elizabeth*, c. 5.

† The 1st of *William* and *Mary*.

rule laid down in *Upton**, in not drawing forth the whole terror with which they are armed, except on a *repetition* of the offence.

It is, however, a favourite axiom, that laws should not be needlessly severe, and not less so, which would seem, in some sort, repugnant to the maxim just mentioned, though not so in reality, that they should be strictly and uniformly enforced; for that men, it is said, are more deterred from the commission of crimes by the certainty, than the quantity of the punishment awaiting them. Now the general disposition of courts martial to pass the lighter sentence, in their hands, on those convicted for the first time of desertion, seems to say, that the heavier one is in some measure excessive; and that it might be dispensed with in the enactment of the law, as well as in the practice of the courts. But punishment, perhaps, becomes sometimes more terrific and awful, from its being reserved: the thunderbolt is not less dreaded because it does not always strike.

It may be foreseen, that desertion of an aggravated kind, or with heinous concomitant circumstances, might sometime happen, wherein it would be desirable, that the *ultimum supplicium* should be awarded; and the power of awarding it may on that account have been suffered to repose in the hands of the court; and possibly the fear that the heaviest punishment might be adjudged, has prevented hitherto the occurrence of cases of that character. The lenient practice of courts martial is no slight security, in any event, against the harsh exercise of the last authority resident in them, and a justification of the confidence of the legislature in depositing it where it has.

The argument generally used against the infliction of capital punishment by a civil jurisdiction, except in the very

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* See the first note of this section.

highest matters of crime, loses a great part of its weight, when applied to military offences; for in the first, the prosecution, though *nominally* at the suit of the king, is for the most part *substantially* at the instance of a private person, suffering a particular injury from the commission of the crime; but in the latter, namely, in offences purely military, the Crown is always the real as well as ostensible prosecutor on the part of the public; no individual having any interest, more than another, except from official duty, in bringing the offender to justice; and though a private individual might feel a reluctance, as the argument assumes, in urging a prosecution to the utmost, from consideration of the severity of the penalty, attendant on conviction, such a feeling could not be imagined to operate on an officer prosecuting on public grounds. It is another objection to extreme punishments in civil cases, but which arises not here, that the heaviness of the penalty induces men, in a spirit of humanity, carried often too far, to acquit, when they should condemn, from an impression, in the peculiar case, of the punishment being more than adequate to the crime: and therefore it happens, that the crime frequently passes with impunity. But courts martial are not reduced to the same strait with juries in a civil court—whose whole office is exhausted with acquittal or conviction; there being no middle course between the adjudication of death, for the verdict is tantamount to it, or indemnity to the offender. The military courts are masters of the sentence, as well as the verdict; and may adapt it, here, to the degree of criminality apparent to them, if it shall fall short of the desert of the severest penalty in their power to pronounce. So that if guilt appear, it will not go unpunished, for the want of a medium, between an inordinate sentence or complete discharge; and the offender consequently will have no hope of escape, no fortunate issue to reckon on from the humanity of the pro-

secutor on one hand, or the pious compromise of the jury on the other. Neither can it be objected to the discretion resident in the court martial, that it may at pleasure aggravate punishment, when in fact it can only be exercised in mitigation of the weight of the penalty, primarily and indiscriminately denounced against the crime, in all its shapes, and as not exceeding its enormity in any.

From the unprecedented extent of our armies, in recent times, the difficulty of keeping up their numbers, and the great bounties held out as inducements for entering the service, desertion had become so prevalent, and so profitable a trade, as to exercise the skill of the legislature to find out new modes for putting down an offence, that had grown to so alarming a height; and yet with all the legislative prudence of parliament, the offence has been still rife for years, from constant and unceasing desertion from one description of corps to another, and from regiment to regiment, owing to the wide dispersion of the force of the country, the change and variation in its destination, and the facility in consequence of the concealment of the offender. The evil effects of the practice have been felt not less in the finance of the nation, than in the body of its military establishments*.

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* The subjoined official return of the desertions that have occurred in the British army, for the ten successive years, comprehended by the document, will shew the prevalence of desertion, and afford some data for the calculation of the pecuniary loss, as well as loss of service, suffered by the country, in consequence of the offence.—

Adjutant-General's Office, November 13th, 1813.

1803	Number of Desertions..........	4,404
1804	No. of do.	5,468
1805	No. of do.	7,081
1806	No. of do.	5,748
1807	No. of do.	3,878
1808	No. of do.	6,611

The necessary consequence has been the commission of increased discretional power, which will be spoken of hereafter, to courts martial. But to the immediate consideration of the Articles, included in the present section.

ARTICLE 1st.—This declares all officers, non-commissioned officers, and soldiers, who shall be convicted of desertion, liable to the pain of death; or such other punishment as a general court martial shall adjudge. This Article formerly contented itself with the simple declaration of the offence, and its awarded penalty; but now it enlarges on the nature of the offence, by shewing, on the authority of the 2d clause of the Mutiny Act, that when once committed, it is not in any degree diminished or qualified by the after act of the offender, though he should have joined himself again to the army, from which he had withdrawn himself without licence, for a renewed and perhaps for an increased service. The concluding branch declares, that no non-commissioned officer or soldier shall be exempt from the punishment, awarded by the first branch of the Article, by again enlisting into the service, but that he shall notwithstanding such enlistment, be reputed a deserter, and suffer accordingly.

The 2d clause of the Mutiny Act may have proceeded on a doubt, for which there would not appear any very reasonable foundation, whether the entering into a fresh contract touching the same matter or service, on the part of the State, with the offender, he was not thereby exonerated from the conditions of the pre-existing contract with all their consequences. In respect of any civil obligations, if the contract

1809	Number of Desertions..........			4,901
1810	No.	of	do.	4,729
1811	No.	of	do.	5,026
1812	No.	of	do.	5,918

had been purely civil, there might have been some ground for hesitation, if there had been no fraud in the transaction on one side; but it would seem plain, that even there, it could not have purged the party from any public crime, not discovered at the season of contracting, which had been committed during the continuation of the previous engagement; nor could the innocent party to the second contract be precluded thereby from prosecuting the same, if it should be afterwards detected.

But the enactment was intended, perhaps, more to obviate some misunderstanding, or to preclude misunderstanding on the part of the soldiery, having a tendency to continue the abuse, as to the effect of the second enlistment, than to satisfy any legal doubt. It would, however, seem a perverse mind, which could fancy, for a moment, that a mere junction again with the army, a stealing back, as it were, into the ranks, accompanied also by a direct pecuniary fraud, could operate as a purgation of the offence, through the medium of which the cheat was effected. This supposition could hardly have been entertained by the most ignorant; though it might have been set up as a plea or colour, under the affectation of simplicity, by the designing. Such a plea is so much put out of countenance, that it cannot at any time hereafter be resorted to as a defence, or, if it should, the Article clearly shews how it is to be regarded.

ARTICLE 2d.—To give additional effect to the preceding Article, by rendering the desertion of soldiers from one corps to another less easy, it is directed, by this the 2d Article, that if an officer, *knowingly receive* or *entertain* any soldier belonging to *another* corps, or *neglect*, after discovering him to be a deserter, to *confine him*, and *give notice thereof* to the *corps* in which the *deserter last served*, such officer shall, on conviction before a court martial, be

cashiered. This punishment would at first sight seem severe; but it is intended to counteract the interest, which officers at certain seasons might have, in raising proportions of men, for the purpose of individual rank, or other personal advantage; when, perchance, from the temptation of completing their quotas expeditiously, they might not be so scrupulous about the quality of the persons enlisted, as about their numbers; or, otherwise, the peremptory sentence of *cashiering*, as in this case directed, would seem rather too rigid a punishment for a slight neglect, attended by no visible criminal intention, either in confining the deserter, or communicating the detection or discovery of him to the corps in which he last served. But whatever the reason of the law, its provision is most clear and determinate; subjecting the neglect of an officer, in not immediately confining the person of the deserter, or in not advertising the corps to which he previously belonged of his confinement, to the penalty of *cashiering*. What shall be said to be "*immediate* "*confinement*, or *notice*," a court martial must, in every case determine.

ARTICLE 3d.—Doubts having arisen, whether soldiers, who had deserted from one regiment, into a distinct regiment or corps, or had entered in any way into his Majesty's military service, were liable to be proceeded against and tried for desertion, or for any military crime subsequently committed by them in the second or any other corps, into which they had afterwards enlisted themselves; a special clause was introduced into the Mutiny Act*; declaring and enacting, that such soldiers are as liable to be tried and punished for such subsequent desertion or other military crime, as if they had been enlisted originally in the corps, in which the offence may be actually committed; and al-

* 3d Clause.

though it should have been known, at the time, that the offender belonged to some other corps.

The doubts stated in the Act, must have originated in the circumstance of the second enlistment, which might be understood to be void *à principio,* from the fact of the pre-existing and continuing engagement to serve; and therefore the breach or neglect of any supposed military duty, growing out of such enlistment, could not be deemed criminal, there being nothing binding, in point of law, as the doubts imply, in the last-mentioned enlistment, so as to oblige the party, enlisting for the second time, to the observance of the military rules or discipline, obtaining for the government of the corps in which he is newly placed. To put an end to such doubts, the clause in question was inserted in the body of the Act.

The Article, now under consideration, founds itself on the clause of the Mutiny Act immediately noticed; and most explicitly defines, that if any soldiers shall desert from, or commit any offence against the rules of military discipline, in any regiment, corps, troop, company, detachment, or party, in which they are actually serving, or receiving pay, they may be tried and punished by a court martial for such offences, as if such soldiers originally or rightfully belonged to such regiment, corps, &c. &c., although in fact, and of right, they belonged to and were liable to be claimed by another corps. The Article proceeding also on the foundation of the 3d clause of the Act, ordains—that, in the event of any soldier being claimed by the corps in which he originally enlisted, and tried for desertion therefiom, that his subsequent desertion from any one or more corps, in which he may have been unwarrantably enlisted, if such shall have happened, may be given in evidence, as an aggravation of his crime; except he shall have been already tried for such subsequent acts of desertion.

It is directed by the Article, that previous notice shall be given in all cases to the offender, of the fact or facts, intended to be produced against him in aggravation of his offence. Such notice is required to be given, for the purpose of enabling the accused, to repel the testimony to be submitted to increase the quality of his guilt, or to offer any thing, which may be competent to him, in extenuation of the additional circumstance of the offence, of which the charge, he may be called upon to answer, may convey not in itself any information. The court will have to see, that the notice given, in conformity with the letter of the Article, be sufficient for the purpose.

The above are the only direct provisions made by the Articles of War, for the prevention and punishment of the crime of desertion; but these are aided by several effectual clauses in the Mutiny Act, principally enlarging the power of the military courts over the crime, by amplifying the power and varying the punishment, which they may, at their discretion, award to it.

The punishment formerly inflicted on persons convicted of desertion, was generally *corporal;* and sometimes the condemnation of the deserter to a designated service on a foreign station, or in some particular local corps, supposed not to be eligible. But of the lawfulness of the latter mode of punishment there was at all times some doubt, and much exception has been taken at it at different seasons on the score of policy, in as much as it was supposed to affect the prerogative of the Crown, in the disposition of the service of the individual; and seemed to throw a prejudice on a particular line of duty, not so agreeable in its execution, or honourable, perhaps, in its promise, as the general tour of duty, but equally incumbent, with any other, on every one carrying arms. To remedy the inconvenience of confining the court martial to the infliction of one kind of punishment, the most

revolting in its nature, as well as the least fitted, in many instances, to the offence, or of exercising a power, very questionable in its exertion, the legislature* has thought proper to authorize courts martial, to vary the punishment applicable to this offence, not by an arbitrary, but a well-governed and defined discretion, and through the medium of certain and well-described penalties.

By the 4th clause of the Mutiny Act such courts are empowered, when the offence shall not seem deserving of a capital punishment † to sentence the offender to be transported as a felon for life, or for a certain term of years. This, with the exception of death, is the greatest degree of punishment, in the power of the military court to adjudge, and will consequently be awarded with a deliberate and steady care, proportioned to the weight of suffering, that may be comprehended in each particular sentence. Next to the consideration which is due to the life of man, is that which may dispose of his liberty, for the whole, or even a certain period of his existence.

The transportation, mentioned in the 4th clause, is declared to be instead of corporal punishment; so that the courts martial would seem to be precluded by the terms of the clause, from adding any corporal infliction, however aggravated the case, to the substituted penalty. It may be inferred from the clause, that transportation is deemed a sufficient punishment for any offence of this description, not requiring the forfeiture of the life of the offender, and of consequence adequate to the magnitude of any crime demanding corporal chastisement ‡.

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* 8th clause of the Mutiny Act.

† In all cases of capital punishment awarded by courts martial, his Majesty is empowered by the 5th clause of the Mutiny Act, to commute it for transportation for life or for a term of years, and persons returning without leave therefrom, or being found at large before the expiration of the term limited, to suffer death, as in civil cases, without benefit of clergy.

‡ The manner of carrying the sentences of transportation into effect,

Any person returning from transportation without leave, or being found at large in *Great Britain* or *Ireland*, or in any of his Majesty's possessions abroad, other than the place to which he is transported, before the expiration of the term limited by the sentence, being convicted thereof by the *ordinary* course of law, he is subjected, by the 4th clause of the Mutiny Act, to the punishment of death, as a felon, without benefit of clergy.

A non-commissioned officer or soldier, convicted of desertion by any general, or general regimental courts martial (for such latter courts, as now constituted, have jurisdiction over the offence), may be sentenced by the 6th clause of the Mutiny Act, to *general* service as a soldier, and his Majesty may direct such service in any regiment or regiments, or corps, abroad or otherwise, at his pleasure.

The effect of the latter sentence is to change the nature of the original engagement of the soldier from conditional, to unconditional service.

By the 7th clause of the Mutiny Act, courts martial are further empowered, in the case of like conviction to sentence a non-commissioned officer or soldier, who shall have enlisted for a limited term of years, to serve for life or any number of years beyond his stipulated term, either in the regiment in which he originally enlisted, or *generally*, in any other regiment. And in addition to such sentence, the court martial may adjudge such offender, if it see fit, to forfeit all benefit as to increase of pay, or pension or discharge, which otherwise might have accrued to him, from the length or nature

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is prescribed by a variety of clauses in the Mutiny Act, according to the circumstances of the case, extending from the 9th to the 12th clause inclusive; but as these principally relate to the office of the commander in chief, or the immediate officer of his staff, and the local judicial authority, and partaking more of a civil than a military arrangement, a general reference to them would seem all that is necessary. The mode directed is as similar, as the case will admit, to the course observed in respect of convicts by the civil tribunal; governed by the 23d *George* the *Third*, c. 56.

of his service. The latter branch of the clause operates to the deprivation of the offender, when a court martial shall think the case warrants such additional punishment, of all reward, arising out of the increased duration of service; such service being involuntary, and therefore devoid of all merit.

In addition to any one of the above enumerated punishments, courts martial are further authorized to direct, that any soldier, convicted of desertion, be marked on the left side, and on a place specified, with the letter D, with ink, gunpowder, or other preparation, so that the mark may be conspicuous, and not liable to be obliterated*. This mark is ordered to be imposed, not for the sake of degradation, solely, but for the purpose of shewing, if there be occasion to advert to the circumstance, that the party, on whom it is affixed, has been once convicted of desertion.

ARTICLE 4th.—The offence, provided against in this Article, is of the same kind, though differing in degree, with that which gives the title to the section. Both the offences are marked by one common incident—an unlicensed departure from his post or duty on the part of the offender; the distinction, constituting the one or the other description of crime, being the intention to return or otherwise. Such an affinity is there between the two offences, that, on a general charge of desertion, it is no unusual practice with courts martial, where the evidence warrants it, to come to a decision negativing the specific offence charged, but finding the fact of, "absence *without leave*;" in the same manner that juries, sometimes, in the civil courts, return a verdict of manslaughter, which it is competent to them to return, on an indictment for murder. But if there were not one common feature belonging to the fact charged and the fact found, the sentence or verdict could not in either case be sustained. It would appear, as if the present Article was introduced for the

* 8th clause of the Mutiny Act.

purpose, principally of allowing courts martial a greater latitude of construction, than they could otherwise have had, of the crime of alleged desertion, so as to reduce it, if they should see occasion, to the lower class of offence, which the 4th Article describes.

The absence of a soldier from his troop or company or detachment, no matter what the cause, or duration of such absence, without the leave of his commanding officer, is, and is so declared by this Article to be, a punishable offence; but certainly of a secondary character to desertion, and therefore generally submitted in practice, though the Article admits of its being referred to a higher tribunal, to the decision of a regimental court martial; and on conviction, in either case, to such discretionary punishment as the court shall think fit to adjudge.

Nothing can justify the absence of a soldier from the place assigned to him, but the leave, or command of his commanding officer, specifically, or generally given; and which the accused, in all cases, will be bounden to prove. But circumstances, not amounting to a complete justification, may, in many instances, palliate the absence of the party. It is equally an absence without licence, although the origin of it should be founded on the leave of a commanding officer, if the absence be continued beyond the term of the licence; yet the absentee will be at liberty to account, by probable circumstances, for the excess of his stay beyond the term allowed him; such as it was caused by involuntary detention, from some uncontrollable power, or inability through sickness, verified or not, as the case may be, by an extension of furlough, by an inspecting field officer, or other military or civil officer, as in that behalf provided by the 114th clause of the Mutiny Act.

In no instance, it is presumed, will it be open to the prosecutor, in a charge of this specific nature, to aggravate the

offence, by any circumstances not immediately related with the absence, *i. e.* by shewing, if the time of absence should have been employed in any culpable pursuit, in what way it was so consumed; for the accused could not have any intimation of such sort of evidence from the charge, so as to defend himself against the effects of it. If any thing, independent of the absence be insisted on, it should be put into the form of a substantive and distinct charge.

ARTICLE 5th.—This Article subjects an officer, non-commissioned officer, or soldier, who shall advise or persuade any other officer or soldier to desert his majesty's service, to such punishment, on conviction by a general court martial, as the court shall award.

By the terms of the Article, it is not necessary that there should be an actual desertion, to constitute the offence contemplated; it is sufficient, without looking to the consequence, which depends not on the will of the party counselling the act, if the advice be given, or the persuasion be used; for in that is the entire offence, so far as it can connect itself with the person giving the counsel.

Serjeant Grant was tried by a general court martial, on a charge founded on this Article, for *advising* and *persuading Heretage* and *Stephenson,* two drummers in the Guards, to desert his majesty's service, and enter into the East-India company's service, with a knowledge that they belonged to the Guards. The court found the prisoner guilty of having *promoted* and been instrumental towards the enlisting of the said drummers, knowing them to belong to the regiment named; and sentenced the prisoner to be reduced to the ranks, and to receive a thousand lashes.

This case was much questioned and canvassed, having been brought, on a motion for a prohibition to prevent the execution of the military sentence, under the cognizance of the Court of Common Pleas. Among the general grounds of

objection to the proceedings of the court martial, there was one stated, which immediately concerns the subject under discussion—*i. e.* that the sentence had no relation to the charge; or, in the words of the learned counsel, on the behalf of *Grant*, " that he ought not to have been *convicted* of an " offence, with which he was not specifically *charged* pre- " vious to trial."

In support of the objection, it was argued by counsel " that " the offence, described in the 5th Article, on which *Grant* " had been *charged*, was that of an accessary *before* the fact; " whereas *that*, of which he had been *convicted*, if he had been " convicted of offence at all, was of an accessary *after* the " fact. That being *instrumental* to their being *enlisted* into " the East-India company's service, was perfectly different " from the offence of *persuading* them to desert. *Per-* " *suading* to desert is the substance of the offence; *enlisting* " is only a *circumstance*. It is true that a man charged with " a capital crime, may be convicted of an offence of an in- " ferior degree, but then it must be of the *same nature* with " the offence charged. But the offence, found in this sen- " tence, is *not* of the *same nature*. The charge contains an " offence prohibited by the Articles of War; it also con- " tains a circumstance, which is there added by way of " aggravation, but which (as will be proved hereafter), is " no offence either by the Articles of War or the Mutiny " Act. Now the offence found is only this matter of aggra- " vation, which is subjoined to the charge, and not the " charge itself, or any inferior species or degree of it, and " even that is found different from the charge. The *charge*, " in that respect, is *advising* and *persuading* to enlist into " the service of the East-India company. The *offence* " found, is *promoting* and being *instrumental* towards the " enlisting."

" Suppose a person indicted as an accessary before the

"fact, in feloniously *advising* and persuading J. S. to steal "my goods, and the jury find, that at such a time and place "J. S. did steal my goods, and that the defendant received "the same goods, knowing them to have been stolen; this "verdict would be void, as finding matter not in issue. 'And "no court, which was guided by the rules of law, could "give judgment against the defendant, on a verdict convict-"ing him of an offence for which he was never arraigned, "and to which it was impossible for him to be prepared "with any defence."

The court refused the prohibition, on reasons not directly decisive of the points mooted by counsel, but yet sufficiently indicative of the opinion of the court on that subject. *Lord Loughborough*, after having laid down with great precision the principles of military law, and having noticed the arguments urged by counsel on both sides, concluded to this effect:—"Taking the whole of the case together, it is clear "that there is ground to suppose, that they (the court mar-"tial) meant to convict *Grant* of the charge. But if by "the nicety which they used in penning the sentence, that "sentence were to be invalidated, it could not be by pro-"hibition, whatever it might be by a review, or by an ap-"peal. The most that can be made of it is an error in the "proceedings, but we cannot prohibit on that account*."

From the finding of the court martial, it may be supposed, that the court did not hold the offender guilty of the act, as expressly charged; but it is undeniable, from the tenor of the sentence, that they held him guilty of an act, which in their minds, and of which they were competent judges, was of like criminality, and of close affinity with the crime alleged. To see this, it will be necessary only to advert to the sentence.

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* *Grant* versus *Sir Charles Gould.—H. Blackstone's Reports.*

"That he, the said *Samuel George Grant*, is guilty of "*having promoted*, and having been *instrumental* towards the "*enlisting* of *Francis Heretage* and *Francis Stephenson* into "the service of the East-India company, knowing them at "the same time to belong to the said regiment of foot guards; "and deeming this crime to be *precisely* of the *same nature* "with *that* which is set forth in the charge, and to differ "only in this, that it is rather inferior, but in a very slight "degree, in point of aggravation, they adjudge him to be "reduced from the rank and pay of a serjeant, and to serve "as a private soldier in the ranks, and to receive one "thousand lashes on the bare back with a cat-o-nine-tails "by the drummers of such corps or corps, at such time or "times as his Majesty should think fit to appoint."

Now it cannot be doubted, but that the court, in the charge exhibited to them, had jurisdiction over any offence, not of a higher order, and therefore subjecting to greater punishment than could be inflicted under the Article in question, which could be included or drawn under the terms, or within the meaning of the charge; and of which such charge would be a sufficient notice to the accused as to what he had to answer. It is clear also, that the offence found, in the opinion of the court martial, at least, is reducible to the terms of the charge; being, as the sentence says, "*precisely* of the *same nature* with *that* which is set "forth in the charge; differing only in *this*, that it is rather "inferior, but in a very slight degree, in point of aggrava-"tion." Of the facts constituting the crime, as appearing in evidence, the court martial were the only judges, and they have said that they amounted to proof of a crime of the same nature with the one charged; and there is nothing to gainsay, what the court concluded, except it be contained on the face of its sentence. On these grounds, it should seem, that the sentence was strictly judicial.

It is impossible for any one but the court martial to know, what it intended, in this case, by the terms of *promoting* and being *instrumental* towards the *enlisting* of the parties; but it is plain that there is nothing in the terms, which would exclude the idea of a crime in affinity, or of the same nature, with the one charged.

Persuasion to desert, which is the essence of the crime charged, will consist with the terms, "*promoting* or being "*instrumental* to *enlisting*." And the act of enlisting, under the circumstances of this case, might constitute a legal if not an actual desertion. At any rate, the terms—*promoting* and being *instrumental* to *enlisting*, do not necessarily shut out the idea of *persuading* to desert, which, contradistinguished from *advising*, need not have been in words; as persuasion might assume a variety of shapes. The holding out, for instance, an extraordinary lure, or bounty to enlist, or promoting or giving countenance, assistance, or facility to the act, when desertion would be an immediate and necessary consequence of such enlistment, would not appear to be a crime easily separable, and so the court appear to have thought, from a persuasion to desert, or so distinguishable from it, that it could not be inquired into under the same accusation, and more especially, as here, when the enlistment is expressly charged in connexion with, and as a circumstance of the persuasion to desert. The general objection obtaining, that, if parties could be found guilty of any other offence, than the one specifically relied on, it would deprive them of the means of defending themselves against the *real* charge, while they were exposed to a covert accusation, kept, on purpose perhaps, in ambush, would not certainly apply in this case; inasmuch as the advice and persuasion of the prisoner was pointedly charged to have a relation to the *entering* into the East-India company's service, which could only be by enlistment.

Almost the whole of the learned counsel's argument proceeded on the ground, which was altogether assumed, that the crime of desertion was committed previous to the act of enlistment; and on this he founded another proposition, which it would seem difficult to sustain, "that the offence "of which *Grant* was convicted, was not an offence cog-"nizable by martial law;" arguing broadly, "That the en-"listing a soldier, who had already deserted, even though "the party knew him to be a deserter, is no offence either "against the Mutiny Act, or Articles of War."

The proposition does not, it is apprehended, go the length of asserting, that a privity and participation in a fraud on the public, and on his Majesty's service, in a transaction directly military, is not criminal in itself; but that, in this case, it is not an offence *specifically* described either in the Mutiny Act, or Articles of War; which may in some sort be allowed. But then, it may be insisted, that it need not such a specification to make it an offence of legal cognizance before a court martial; inasmuch as if it should appear to be an act, of which there would appear to be little, if any question, prejudicial to military discipline, it is comprehended in the second section of the 24th Article of War*. It might also, without much violence, be brought as a secondary case, as that of an accessary to the promotion of

* *Tytler* allows a much greater latitude, more perhaps than it will bear, to the Article last referred to, when in speaking of it, he observes, "In "general, it may be held as Military Law, that all accessaries to the "commission of crimes, or offences, either by the furnishing of actual aid "or assistance to the principals, or by silently witnessing or concealing the "crime; harbouring or assisting the escape of the criminals, or barely "*neglecting* that *essential duty* of every soldier, to *promote* to the utmost "of his power the strict observance of good order and discipline, for which "the martial law invests him with full authority, are *guilty* of a *positive* "*crime*, and amenable, for the punishment thereof, to the cognizance and "judgment of a court martial." P. 197, 3d edit.

the reception or entertainment of a party before enlisted, under the second Article of the present section; making it an offence, entailing the heavy punishment of *cashiering* on any officer, who shall knowingly receive or entertain a soldier belonging to another corps. There can be no doubt, therefore, that such an offence is known to the military law.

The foregoing laws and ordinances, as they respect the crime of desertion, have relation principally, if not wholly, to the members of the military profession. There are other statutory regulations, acting indirectly on the crime, as one of considerable public injury, in the punishment of the acts of the subject, in a civil relation, which shall lead to the promotion of the crime, or shall tend to enconrage it, when perfected; and others, holding out rewards, for the apprehension and detection of deserters.

Among the first is the 37th of the king, c. 70, enacting, "that if any person shall *maliciously* and *advisedly endeavour* "to *seduce* any person serving in his Majesty's service by sea "or land, from his duty and allegiance, &c. &c., he shall "be guilty of felony, and shall suffer death without benefit "of clergy." Without any consideration of the motive, by which the party may be urged, the 143d clause of the Mutiny Act enacts, that if any person in his Majesty's dominions shall directly or indirectly *persuade*, or *procure* any soldier to desert or leave his Majesty's service, he shall, on lawful conviction, forfeit for every offence, the sum of one hundred pounds, to any one who shall sue for the same; and if he hath not any goods or chattels, lands or tenements, to satisfy the amount; or, if from the heinousness of the crime, the court, by which the offender may have been convicted, may consider that the forfeiture is not a sufficient punishment, it is lawful for such court to commit the offender to prison for the term of twelve months, and to order him also to stand in the pillory, for the space of an hour, in the

market town where the offence was committed, or in some market town next adjoining to the place, where it may chance to be committed. And by the 112th clause of the said act, it is further declared, that if any person harbour, conceal, or assist any deserter, knowing him to be such, he shall forfeit, on conviction before any of his Majesty's justices of the peace, on the oath of one or more credible witness or witnesses, the sum of twenty pounds for each offence, to be levied by distress; one moiety to go to the informer, the other to the colonel or other officer commanding the regiment to which the deserter belonged; or if the offender hath not sufficient to satisfy the penalty, on the distress, or shall not pay the amount within four days after conviction, such justice may commit the offender to the common goal, for the term of six months.

Among the second, is the 110th clause of the Mutiny Act, which empowers, "for the better encouragement of any person or persons to secure or apprehend "deserters from his Majesty's service," the justice of the peace, committing a deserter to prison, to issue a warrant to the collector of the land tax, or other officer, according to circumstances, named in the Act, for the payment of twenty shillings to the person, who shall apprehend or cause such deserter to be apprehended. And by the preceding clause of the Act, it is declared lawful for the constable, headborough, or tithingman of any town or place, or for any officer or soldier in his Majesty's service, to apprehend any person, who may be *reasonably suspected* to be a deserter, and bring him before a justice of the peace, living in or near the town or place, where such person shall be apprehended, who shall examine such suspected person, and if by the confession of the party, or testimony of one or more witnesses, or by the knowledge of such justice of the peace, it shall appear, that such suspected person is a listed soldier,

the justice of the peace shall forthwith cause him to be conveyed to the goal of the county or place, where he shall be apprehended; and in particular places, mentioned in the Act, according to the directions in that behalf, as in the said clause set forth.

With a warrant from a justice of the peace, a commissioned officer may break open any dwelling house or outhouse, in search of a deserter; which warrant however cannot in any case be had without reasonable proof that a deserter is concealed in the premises; but if such officer enter into the same without such warrant, under pretence of searching for deserters, he will, upon due proof thereof, forfeit the sum of twenty pounds.

From the prevalence of a practice, that persons, for their own purposes, either to obtain necessaries and provisions, in their passage from one remote place to another, or more commonly to escape prosecution for some petty offence, would voluntarily deliver themselves up as deserters, or being apprehended for desertion, or some other offence, would confess themselves, in the presence of a magistrate, to be deserters, it was at length thought fit to introduce a clause in the Mutiny Act for the prevention of such abuse; and accordingly the 111th clause was framed, enacting that any such person, who should surrender as, or admit himself to be a deserter, should be deemed to be duly enlisted, and to be a soldier, whether he should have been actually enlisted or not.

SECTION THE SEVENTH.

Quarrels and sending Challenges.

As strife and quarrels might prove more dangerous, in their consequences, from the circumstance of closer association, from the ready recourse to arms, and from the constant habit of using them, in a military community, than in the civil ranks of life; so the aim of the framers of our military code has been on all occasions most conspicuous, in the ordinances declared by them for the prevention and repression of the conduct and actions of soldiers, having a tendency to a breach of the peace, or to the interruption of the quiet of the camp or garrison. To this end, specific rules have been laid down, from the most distant times, for forbidding and discountenancing provocations of every sort, that might stir up heats or animosities among the soldiery.—Thus in the charter of *Richard* the *First*, published on his voyage to the *Holy Land*, it is ordered, that " any one who shall reproach, " abuse, or curse his companion, shall, for *every time* he is " convicted thereof, give him *so many* ounces of silver." And by the statutes and ordinances of *Henry* the *Eighth*, the penalty is increased to imprisonment, in any one, who shall throw out even a *national* reflection against his comrade*. By the same statutes it is also positively enjoined, " that noe " man debate, strive, or contend, for arms, prisoners, lodg- " ings (then the common subjects of strife), or for any *other* " cause, malice, or quarrell, or other thinge, whereby any " ryott, contention, or debate, may growe in the hoste, upon " peyne of imprisonment, and *further punition* at the king's " pleasure." Accessaries to suffer the same punishment†.

Drunkenness being ever a great promoter of disputes—it

* 29th section. † 28th section, title *Barritours*.

was holden, on this account, an object of most exemplary punishment by the ordinances of the *Earl* of *Northumberland*, in the time of *Charles* the *First*, when coupled with an actual quarrel; it being ordained, under the title of "drunken "and quarrelsome officers,"—"That what officer soever, "shall come drunk to his guard, or shall *quarrel* in the "*quarters*, or *commit* any *disorder*, shall be casseered *without* "mercy." And to give an interest in the prosecution of the offender to conviction, it was further ordered, by the same Article, "that the *next* officer *under* him, shall have his "*place*, which he may *pretend to* as his *right*, and it shall *not* "be refused to him*.

To prevent a further step towards feuds, it was commanded by the last-mentioned ordinances, "that no man "shall draw any sword in a *private* quarrel, within the camp, "upon pain of death." And by the same ordinances it was ordained, "that no corporal or other officer, command-"ing the watch, shall wittingly suffer a soldier to go forth "to a duel, or *private* fight, upon pain, also, of death."

In the Articles of War for the government of the army, then employed in *Scotland*, and in the same reign, there is an especial injunction against duelling, and in the following emphatic terms:—

"All must shew their valour *against* the *enemy*, and not "by revenging *private* injuries; which, upon complaints to "their superior officers, shall be repaired to the full. And "if any man presume to take his own satisfaction, or chal-"lenge a combat, he shall be imprisoned, and have his "punishment decerned by the martial court†."

Both the last and the preceding ordinances contain the most positive regulations for the quelling and suppression of *public affrays*; but an Article of the last, rather than the

* Article 5th, tit. "Commanders must see God duly served."

† By Article 7th.

former, shall be noticed, on account of its brevity. It expressly enjoins, "that all officers shall be careful by all "means, to part quarrellings amongst soldiers, although "they be of other regiments or companies, and shall have "power to command them to prison; which, if the soldiers "shall disobey, or resist, by *using* any *weapon*, they shall "*die* for it*."

In the Rules and Articles of War of *James* the *Second*, drawn with great precision and skill, and which may with truth be called the substratum of our Mutiny Acts, all the salutary regulations or the spirit of the former statutes and ordinances, appear to have been embodied in one plain and most comprehensive Article †, which differs not in substance, nor materially in form, with the Articles of the seventh section, which it is now proposed to examine, and which will be found, on inquiry, to be not less cautious and considerate in its provisions, than the ancient statutes, for securing the peace and order of the military state.

ARTICLE 1st.—Seeng that a warm and generous spirit, under the dictates of a proud and jealous honour, might by sudden excitement be hurried into a most serious outrage, more important from the wide interests that might by possibility be engaged in it, the policy of this Article is directed to the obviation of the causes, that not unusually lead to the evil under apprehension. This policy is evinced in a very singular manner: not in the forbidding only of all provocations to affronts, but in requiring a summary submission, which at the time of admitting or acknowledging a present error, shall have the effect, certainly a happy one, of removing the ground of future dispute. The simple injunction of the Article is, "that no officer, non-commissioned offi-"cer, or soldier, shall use any *reproachful* or *provoking*

* Article 6th. † The Article here alluded to is the 54th.

"*speeches* or *gestures* to another, upon pain, if an officer, of "being put in arrest; or, if a non-commissioned officer or "soldier, of being imprisoned, and of asking pardon of "the party offended, in the presence of his commanding "officer."

The obvious intent of this provision would seem to be, to check, by direct and prompt means, which the Article favours, the earliest manifestation of a spirit or disposition to quarrel, by subjecting the offender, without any formal charge, to immediate arrest or imprisonment, and to make such honourable atonement for the provocation, as the case appears to require, in the presence of his commanding officer; who is for this purpose, and most naturally, erected into a domestic forum, as being the depository, at the time, of the honour of the corps, for awarding the amends due to the party offended, as well as for giving fit solemnity to the act.

The course of this summary remedy is peculiarly well adapted to affronts *publicly* offered, and which the Article has especially in view. It pursues its object, so far as may be collected from the operation of the Article, somewhat after the summary manner of the common law, formerly, in certain offences, where the offenders were taken, as in the language of the law is described, in the mainour, that is, with the crime full and flagrant about them, when it would not admit of denial.

The Article must suppose the *speeches* or *gestures*, on which it acts, as open and notorious, and as calling for immediate interference; as it requires no solemn proceeding or inquiry into them, either before or subsequent to the arrest.—Any military officer standing by, as well as the person offended, would be authorized in ordering the arrest; for such a power is given to officers of every description to quell all quarrels and frays; and as the speeches and gestures in question are regarded by the Article as having a tendency

to those consequences, and therefore interdicted, they appear to authorize the same interference.

In respect to the submission, to be made in the presence of the commanding officer, there is no specific mode pointed out for enforcing it, possibly under the idea, on which the whole Article proceeds, that it is an arrangement of that mild and beneficent nature, congenial with a private judicature, which exists in every family, to the influence, rather than the force of which the members feel no difficulty or reluctance in submitting themselves. The commanding officer is placed here, for the desirable object of healing animosities, in that revered and enviable situation, in which his Majesty, as the head of the great family of the army, has been often proud to shew himself, in requiring, by virtue of his place and dignity, a becoming and unhesitating deference to his will, in a matter inseparably connected with the immediate order and safety of the society, over which he is set. And there would seem little doubt, from the authority immediately emanating to the commanding officer from the Crown, through the medium of this Article, that the latter is armed with the necessary incidental power, if not with all the dignity and grace of the Crown, to effect the intended purpose.

Of the benevolent, and, as it were, paternal interference of the sovereign himself, to stay the unlicensed and unseemly progress of private resentments, and of his patient, forbearing, and indulgent pains to reconcile the members of his military family towards one another and to themselves; and of the wise, as well as gracious, use of his authority, when it has been needful, in effecting the sacred end it had in contemplation—a number of instances are of record, abundantly sufficient to prove, from the unquestioned and uninterrupted exercise of it, the existence of this supreme power, to depress, of its own means, the turbulent passions of those

" thority, and injunction; as also, if they shall see occasion, " to impose a strict arrest upon both the parties, until a " report shall be made of the matter to his Majesty."

The court, in obedience to his Majesty's command, took the subject, as the minutes of the proceedings state, into their most serious consideration, and upon mature deliberation, settled such acknowledgment and apology to be made on the part of *Sir W. Draper* to *Lieutenant-General Murray*; and also such answer thereto to be expressed by *Lieutenant-General Murray* towards *Sir W. Draper*, as in their judgment the occasion merited, and as might mutually be given and accepted consisent with the honour of both.

Lieutenant-General Murray and *Sir W. Draper* being thereupon called into court, the judge-advocate notified to them the determination of the court martial upon the several matters of charge and complaint, which had been referred by his Majesty's warrant for their decision, together with his Majesty's pleasure thereon: and then stated the proceedings subsequently had between the court and his Majesty, and what had resulted from it, which would be communicated, as the judge-advocate observed, with more propriety and weight, by the president.

The president, *General Sir G. Howard*, having first explained the conduct which the court thought itself indispensably obliged to pursue, addressed the parties, to the following effect:

" I am desired by the court to acquaint you *Sir W. Draper*, " that they do not think those very offensive words 'false and " 'infamous,' used by you to *Lieutenant-General Murray*, " your commander in chief, and in time of actual service, " can be justified from any circumstance which previously " happened, and therefore think it incumbent upon them to " declare their opinion, that you ought to make a satisfactory

" acknowledgment to *Lieutenant-General Murray*, for the " same in the following words:

" This court martial having upon mature consideration " expressed their opinion, that *Lieutenant-General Murray's* letter to me, of the 16th January, 1782, which drew " from me the intemperate words in question, viz. 'your " insinuations, that I am attempting to take the command " from you, is *false* and *infamous*,' did not import the " charge of any actual attempt to take the command from " him, which, hurt as I then felt myself, I had conceived. " I do not hesitate to acknowledge, that those words were " very improper and unjustifiable, and to declare my con" cern for having used them, and I do, in deference to the " sense of the court martial, desire that *Lieut.-General Murray*, will accept this declaration as an apology for the same."

' And the court are of opinion, that you, *Lieutenant-General Murray*, ought to be completely satisfied with the ' said declaration, and express that satisfaction in the fol' lowing words, viz.:

" I do accept this acknowledgment, as a sufficient and " full apology for the words used by *Sir W. Draper*, in his " letter to me, and I do, on my part, express my concern, " that I should have made use of any words, which could " have so much hurt the feelings of *Sir W. Draper*."

' And the court expects to receive from both parties, the ' most solemn assurances, that this affair shall have no fur' ther consequences.'

Sir W. Draper, upon hearing the terms proposed, declared his willingness to regulate his conduct by the judgment of the court, professing himself content to make the apology, which the court had prescribed, as proper, and consistent with his honour, and he was ready on his part to comply with their injunction in its full extent.

who are placed, so peculiarly, under its command and guidance. If these shall be satisfactorily shewn, as it is trusted they may, it will require little effort to make out, that the same power, or a part of it, resident in the Crown, accustomed as it is to act in most things by the agency of others, may by it be communicated at pleasure, as here, to its direct and immediate agent, for a most benevolent end.

Two memorable instances of the interposition of his Majesty, in similar cases, occurred at intervals, not very distant from each other, and each occasioned by an humble suggestion, or representation to the king, of the evil consequences that might result to the parties involved in disputes, unless the especial commands of the Crown should be imposed on the individuals concerned, to bring their differences to an immediate and amicable conclusion.

The first happened in the month of January, 1783, and was called for by the particular representation of a general court martial, at the time of delivering their sentence on certain charges against *Lieutenant-General Murray*, on account of his conduct in the defence of *Fort St. Phillips*, in the island of *Minorca*, and alleged personal pique towards *Sir William Draper*, who preferred the charges.

The court, in investigating the matters in question, had before them a letter from *Sir William Draper*, addressed to *Lieutenant-General Murray*, then commanding at *Minorca*, containing the following passage:—" Your insinuation that " I am attempting to take the command from you is *false* " and *infamous*." To which an answer was returned from *Lieutenant-General Murray*, which was also before the court, embracing among other things, the annexed threat.— " As to personal abuse, I shall do myself justice, you may " be assured, when the proper time arrives." With proof of this subsisting ill will before it, which might probably

shew itself in some open act of offence, when the restraint of the court martial should be taken off, the court did not think fit to separate, without making known to his Majesty the temper and disposition of the parties towards each other, as it appeared on the record of their proceedings, in order that his Majesty might interpose his power to avert the evil anticipated.

His Majesty having his attention directed so particularly to the writings of the parties respectively, indicative of the exasperated state of the feelings of both, was most graciously pleased to convey his commands, that the court martial should be re-convened, which was accordingly done on the 30th of January, at the Horse Guards; when

" The judge-advocate acquainted the court, that he " had it in command to express to them his Majesty's entire " approbation of their having pointed out those offensive " and intemperate expressions, which had appeared before " them in evidence, obviously tending to the most serious " consequences, between *Lieutenant-General Murray* and " *Sir W. Draper*; for the preventing whereof his Majesty " is pleased to refer it to the court martial, after weighing " every circumstance, to propose some mode of accommo- " dating the dispute, by such explanation, acknowledg- " ment, and concession, on either part, as the occasion " may seem to require, and which may, in the opinion of " the court, consist with the honour of the parties, and " their character, as officers; and that it is his Majesty's " further pleasure, that convening the parties before them, " they do exert their earnest endeavours, to induce a re- " ciprocal acquiescence in such honourable terms of ac- " commodation, and to obtain from each a solemn en- " gagement, that the difference shall then terminate, and " have no further consequences: to which end the court " have his Majesty's permission to use his royal name, au-

Lieutenant-General Murray shewing some disinclination to comply with the recommendation of the court, and more especially to so much of it, as required him to express his concern, that he should have used words which could hurt the feelings of *Sir W. Draper;* the court offered some conciliatory arguments and explanations to reconcile their act to the parties, and begged of *Lieutenant-General Murray*, in particular, to retire for awhile, and consult some of his friends on the subject.

After some time had elapsed *Lieutenant-General Murray* returned into court, and delivered himself from a written paper, as follows:

"In all private concerns, I conceive I am master of my "own actions, and I choose to keep my honour under my "own preservation: in every military point, I am under the "orders of the king, whose commands are sacred. If *Sir* "*W. Draper* has been guilty of any military offence, the "department, to which he belongs, will do justice to the "country—As to what respects me privately, I seek for "no interference."

The court, after having required, and received from *Sir W. Draper* a pledge of his honour, that no adverse measures should originate from him, in consequence of this unhappy difference, judged it necessary to remand *Lieutenant-General Murray*, subject to his arrest, until a report of the whole proceeding should be made to his Majesty, and his royal pleasure signified thereon.

Lieutenant-General Murray was afterwards placed, by order of his Majesty, in *close* arrest, from which he was not released until he had pledged himself to the same effect with *Sir W. Draper.*

A correspondence was instituted in the interim, between *Sir Charles Gould*, the judge-advocate-general, and the lieutenant-general, under the authority of his Majesty, wherein

the former endeavoured to persuade the general to comply with the injunction of the court, assigning, among other things, as a reason, "that his Majesty entirely approved "the procedure of the court martial, and the mode pre-"scribed by them for terminating the difference, and had "entertained hopes that a deference to their opinion, en-"forced by an express authority from his Majesty, would, "upon calm reflection, have induced *General Murray* to "submit to their decision, as his Majesty's gracious dispo-"sition had not for its object the passing over unnoticed the "very intemperate words produced in evidence, but only "the substituting an honourable concession, or some other "proper mode of reparation for the offence given, in place "of the violent and exceptionable measure, which was ma-"nifestly in the contemplation of the parties; and as the re-"spective apologies, which have been enjoined by the court, "appear to be strictly becoming, and due on each part, as "well as requisite in point of example." But this and other conciliatory attempts did not produce the expected effect, the general conceiving that he could not adopt the dictated apology, without the sacrifice of truth and honour; he expressed throughout his letters to the judge-advocate, a sense of the willing duty he owed to his Majesty, and of the implicit obedience due to his commands, but his own imperious and invincible impression of honour could not in the present instance allow him to subscribe the requisite apology; since the subscription of it would make him unhappy, as in a memorial to his Majesty, he emphatically expressed himself, while he had an existence. And he concluded by submitting, that he was still disposed to make a declaration before the court martial, if it should be required of him (which he set forth in his memorial) that might answer the end of the one proposed, without violating the truth or circumstances of the case.

The suggested apology was ordered by his Majesty to be laid before the court martial, who, following the gracious and humane condescension of his Majesty, in attending to feelings, perhaps too far refined, of an old and a zealous public servant, yielded readily to the reception of it in lieu of their own; still asserting in their minute on the occasion, what was due to the intention and dignity of the court.

The substituted apology was of the following tenor,

"I do, in deference to the court martial, accept this ac-"knowledgment as a sufficient and full apology for the words "used by *Sir W. Draper* in his letter to me, and I think it "very unfortunate, if any words of mine should have so "much hurt the feelings of *Sir W. Draper*, whom I never "did mean to offend while he was under my command at "*Minorca*, as I have often declared both in public and "private."

On which the court came to the subjoined resolution:

"Upon full consideration the court retain their opinion, "that the reply, which they at their last meeting en-"joined to be made by *Lieutenant-General Murray* to *Sir "W. Draper*, was just and proper, and they have the sa-"tisfaction of knowing that it has been honoured with his "Majesty's entire approbation; but being willing to com-"ply with *Lieutenant-General Murray's* wishes, as far as "may be consistent with that opinion, and esteeming the "reply now offered in his own words, to be of the same im-"port, with this difference only, that it expresses a more "direct disavowal of any intention to offend *Lieutenant-Ge-"neral Sir W. Draper*, than the court had thought fit to en-"join, the court does, agreeably to his Majesty's gracious "permission, adopt the same, instead of the reply, which "they had before prescribed, and declare that it ought to "be accepted by *Lieutenant-General Sir W. Draper*, as "equally satisfactory."

The matter there ended.

There are some who may think, that the punctilious notions of *General Murray*, were so subtile and overstrained, that it was unreasonable to expect any deference to them, on the part of a grave and judicial body, acting on public principles, and with the eyes of the public upon them; still, it must be remembered, they were the notions of a venerable public functionary, originating in honest, though perhaps erroneous impressions, and graciously allowed, if not sanctioned by the highest military authority.

This condescending mediation of his Majesty, remarkable for such forbearance, and for so much tenderness, shews how near an object it is to him, as the head of the military state, to appease, by immediate means, the rising humours of his servants, ere they break out in excesses, that admit not of remedy, and can only be repressed by the very last and most painful resource.

The second instance referred to, occurred in the year 1789, at the conclusion of a court martial previously holden at the Horse Guards, on *Major John Browne*, of the 67th regiment, of which *General Lord Frederick Cavendish* was president.

On the 11th of October the court definitively concluded on the charges, and subscribed their sentence; wherewith they respectfully represented to his Majesty certain suspicions they had conceived, in the course of the matters they had just investigated, and on the examination of the proceedings of a previous court martial at Antigua, that much animosity existed between the parties principally concerned in the late trial, and between others who had taken a collateral part in it, which, if not restrained by the hand of authority, might, as the court apprehended, end in most calamitous consequences. This representation was attended by nearly the same proceedings as in the foregoing case.

On the 18th October the court was reassembled, pursuant to an order from his Majesty; and the sentence was publicly announced, by the direction of his Majesty, as also the proceedings subsequent thereto.

The judge-advocate-general then notified to the court his Majesty's further commands, as expressed in the following communication:

"It having been most humbly suggested to his Majesty, "that from several circumstances that have occurred, in the "course of the trial of *Major Browne*, and from others, "which appear on the minutes of a court martial held "at Antigua, it is evident that much heat and animosity "subsists between the parties, and that without some timely "interposition, consequences may be expected subversive of "military order and discipline, and in direct violation of the "Articles of War.

"His Majesty is pleased to refer it to the court martial "now re-convened by his command, to take the most effec-"tual measures for preventing the mischief apprehended, "and to that end to call before them such officers whom "they shall *suspect* to be principally irritated against each "other, and to require from them solemn assurances, that all "differences arising out of the subject matter of the trials "of *Major Browne* and *Captain Hedges*, respectively, or "in any wise connected therewith, shall now terminate, and "have no further consequences; and if upon the represen-"tation of any of the parties, it shall appear, that in respect "of any unguarded and intemperate expressions, which may "have been heretofore used, an acknowledgment, apology, "or concession, may be necessary or proper, the court will "prescribe the terms, in which the same shall be conceived, "and will cause it to be made in their presence; and for "the better effectuating these purposes, the court martial

" have his Majesty's permission to make use of his royal " name, authority, and injunction; and if they shall see oc- " casion, to impose a strict arrest upon any of the parties, " until a report shall be made to his Majesty."

Lord Frederick Cavendish the president, was desired by the court to take upon him the conduct of this business, for carrying his Majesty's gracious commands into execution, and as some traits of heat and asperity had been noticed between *Major Browne* and *Major Sladden*, between *Major Browne* and *Captain Hedges*, and also between *Major Browne* and *Lieutenant Urquhart*, of the 30th regiment, those four officers were especially called upon; whom his lordship addressed to the following effect, viz.—

" The members who compose this court, sensible of the " notions of honour which belong to the character of an " officer, have seen reason to apprehend (when the parties " shall be no longer under restraint) consequences, in " their opinion, of a very mischievous tendency;—for if " courts martial, sanctioned by law to dispense military " justice, and on many occasions, guardians of military " honour, are so perverted from their institution, as to " become the sources of quarrel and personal violence, they " will no longer be resorted to;—discipline and good order " will be deprived of a natural support, and the redress of " injuries seem to be left solely to the will and lawless pas- " sions of individuals; impressed with this idea, and con- " scious, that in passing the same over in silence, they " should degrade the character his Majesty has, on this oc- " casion, been pleased to honour them with, and subject " themselves to be hereafter deemed accessaries in the dis- " orders that might ensue, they thought it their duty to lay " these sentiments and apprehensions before his Majesty, " as nothing short of his royal interference could remove

"the difficulty under which officers, entertaining high "notions of honour, would feel themselves so circum-"stanced."

After which his lordship required *Major Browne, Major Sladden, Captain Hedges,* and *Lieutenant Urquhart,* each severally, to pledge his honour, that no adverse consequences should ensue in respect of the subject matter of the late trial of *Major Browne,* or of the trial of *Captain Hedges,* had in *Antigua;* and that all differences arising out of the same, or in any wise connected therewith, should now terminate and be at peace: and the said *Major Browne, Major Sladden, Captain Hedges,* and *Lieutenant Urquhart,* did accordingly each pledge his honour to the court in that behalf.

This done, the court martial was declared to be dissolved, (in consequence of his Majesty's pleasure, intimated to the judge-advocate-general), and *Major Browne* was released from his arrest.

The latter interference differs from the preceding one, in as much as it applies to others, who were not directly before the court as parties, either in the original trial at *Antigua,* or the one which had resulted from it. It will be seen that in consequence of his Majesty's commands, "to call before "them such officers whom they should suspect to be prin-"cipally irritated against each other;" the court specifically summoned into their presence, in addition to *Major Browne* and *Captain Hedges,* in whose differences both the courts martial originated, *Major Sladden* and *Lieutenant Urquhart,* whose conduct had come incidentally under the view of the court in the course of the trial, and had raised a suspicion, that it might eventuate, if not timely restrained, in some act of violence; a much larger licence than had been granted in the former case, and apparently on slighter grounds.

Many other instances of this plenary interposition of the

Crown, on proper requisition, or on information conveyed to it, or accidentally coming to the royal notice, might be enumerated with ease, if these should not be deemed sufficient, which they are presumed to be, to shew the extent of the prerogative, to interpose in a summary manner, in nascent differences and disagreements between its military subjects, and to dictate the terms of their adjustment. Such prerogative is not connected alone with the supremacy of the king over the national armies, or with the capacity of his Majesty in civil and domestic concerns, as the fountain of justice and general conservator of the peace of the kingdom; but as the grand depository of the honour of a body of men, formed, constituted, and preserved on the principle of honour, over which the Crown is peculiarly appointed to preside, and over which it has at all times exercised a mediate or immediate guardianship.

The exercise of the royal prerogative, as noticed, was, as it may be remarked, of a special kind, directed by particular circumstances. It was required, in both cases, by the suggestion of a court martial, at the time sitting, and particularly advised of all the facts, which had induced the suggestion; and the court, of consequence, presented itself to his Majesty, and was so selected, as the fittest organ or medium for putting an end, through the communication of a power to that effect from the Crown, to the subsisting differences between the officers in question, by ordering such a reparation, as should seem meet, to the wounded feelings of the parties. The courts were of the king's choice, and for the reason explained, in preference of any other commission, which might have been appointed, if it had so pleased his Majesty.

The court martial was not called upon to act, in either case, as a judicial body, and in its ordinary office, for there was nothing before it on which it could judicially

proceed, but as a special board of officers, appointed for a particular purpose, and under a particular power. The whole proceeding directed is plainly and manifestly extra-judicial; growing out of an emergency; conceived not to admit of the forms of a regular, judicial inquiry; but to demand, from the urgency of the occasion, an instantaneous decision. There is no specific complaint laid against any one; no suitors for justice; no examination at the instance of parties; no sentence to be pronounced. The whole that is required, is the summary dictation of terms to persons dissatisfied with each other, in pure regard of the power of the Crown, and without any previous assent or submission of those concerned.

One cannot view the manner, in which the prerogative is thus exercised, without being reminded of a branch of the jurisdiction, formerly exercised by the court of chivalry, acting directly from the Crown; the material part of whose judicial functions has long surceased, without a disposition, or a wish, on any part, to see it resuscitated in its primitive force. It has, however, been regretted by many wise and good men, that a part of it at least, which the practice of his Majesty, in the cases explained, appears to have a tendency to revive, in so far as regards the military state, had been allowed to survive the failure of its general jurisdiction. It was one of the properties of this court, as shewn by writers* on the law of *England*, and as described by *Blackstone*, to act as "a *court* of *honour*, to give satisfaction to all "such as are aggrieved in *that* point; a point of a nature so "nice and delicate, that its wrongs and injuries escape the "notice of the common law, and yet are fit to be redressed

* *Seldon*, *Salkeld*, *Hale*, and others, as noted by *Blackstone*, 3d vol. p. 103.

" somewhere. Such, for instance, as calling a man a " *coward*, or *giving* him the *lie*; for which, as they are pro- " ductive of no immediate damage to his person or property, " no action will lie in the courts at *Westminster*; and yet " they are such injuries, as will prompt every man of spirit to " demand some *honourable* amends, which by the *ancient* " law of the land, was appointed to be given in the Court " of chivalry. But *modern* resolutions have determined, " that how much soever such a jurisdiction may be expe- " dient, yet no action for words will lie therein." The learned judge then explains why such court cannot entertain a *civil* suit—concluding, " and therefore this court of chi- " valry can at most only order *reparation* in *point* of *honour*, " as to compel the defendant, *mendacium sibi ipsi imponere*, or " to take the lie he has given upon himself, or to make such " other submission as the *laws* of *honour* may require." The proceedings in this court were by petition, in a summary way.

It is scarcely necessary to observe in this place, how very closely the course pursued by his Majesty in the preceding cases, conforms to the usage, practice, and jurisdiction, as exercised by the court alluded to, and as described by the learned commentator on the laws of *England*. It prescribed as has been shewn, that the parties, implicated in disputes or differences, should be forthwith brought before the court, which his Majesty appointed, should submit themselves to such concession on either part, as, from a consideration of the circumstances of the case, should be dictated by the court, and as should consist with the *honour* of the *parties*, and their character, as *officers*—and that the court should receive from both parties a solemn engagement, that their differences should then terminate, and have no further consequences. In the instance of the second commission to the court martial, where there was only a suspicion of the latent

ill-will of some parties, and an imperfect knowledge only of the matters in dispute, in speaking of the apology there, his Majesty was pleased to be most specific in his directions to the court, namely, to this effect:—"If, upon the representation of any of the parties (to be brought before them), it shall appear that in respect of any unguarded or intemperate expression, which may have been heretofore used, an acknowledgment, apology, or concession, may be necessary or proper, the *court* will prescribe the *terms* in which the same shall be conceived, and will cause it to be made in their presence; and, if they see occasion, to impose a *strict* arrest, upon any of the parties, until a report shall be made to his Majesty."

The proceedings, throughout, are of a prompt, and it may be added, of an arbitrary character; such as may be dictated by an admitted superior to one who is obliged to receive and conform to his commands; not indeed a slavish submission of any lawful rights to unbounded power, for no such power is known in the British constitution, but of lawless passions to the control of a legitimate and limited authority.

The power, thus used by the Crown, is peculiar to it, and exclusive of any other authority. That the military courts regard such power as wholly beyond their participation or exercise, unless by particular permission or grant, may be immediately collected, from their humble representations, in the cases above-mentioned, of the circumstances, calling for its especial interference, to the Crown, for the purpose of originating, or not, according to its pleasure, the necessary proceedings therein, as a well-known and natural course. That the power of a court martial is incompetent to the end described, without some especial authority, may be assumed, not only from its act, but from its very constitution; all its

judicial power being derived from the king's warrant, and being confined to the matters committed thereby to its cognizance. Such courts can originate no proceeding whatever, with a view to a judicial conclusion, but what the warrant authorizes—except in *contempts*, arising in the face of the court; and this necessarily for the order and protection of its proceedings.

The power exerted, in the cases particularized, has nothing in it, as it has been shewn, of a judicial quality, but approaches rather to that of regulation or police. It is not drawn forth to punish crime, but to prevent it; and therefore may be committed to other hands, according to the pleasure of the Crown, than to those of a court martial, assembled only on particular occasions, and consequently with very limited power to repress the evils under consideration. Like all other matters of police, which are too numerous for any single power to deal with, and too unimportant in many things, to demand the royal attention, they may be left to the care of a subordinate magistracy.

In the Article, now contemplated, his Majesty appears to have been desirous of communicating a part of the royal power exercised by himself, and to the same end, to the commanding officer of a regiment, to be used by the latter, as the representative of his Majesty, on the spot, in a prompt and summary way, to the suppression of those provocations, which, if not restrained by a timely and present authority, might irritate to the most deadly and destructive consequences.

The intended operation of the first Article of the present section, is to impose an immediate *personal restraint*, and to exact an apology from officers or soldiers who shall use reproachful or provoking speeches or gestures towards one another—thereby to prevent an instant assault,

and to do away any future excitement to it, by an abandonment, through the medium of the apology, of the cause of a quarrel.

These ends are effected, through the directions of this Article, in the same summary way in which his Majesty* is accustomed to act, in allaying and composing the differences of his military subjects, so often as they fall under the royal cognizance.

In a society like the military state, especially constituted and held together by the principle of honour, a bond of union too nice and delicate for the consideration of the courts of common law, or for the touch, possibly, of any other hand than that which has the first interest in sustaining the principle in all its virtue, the king, as grand superior of that state, has ever maintained to himself the right of judging and determining in all matters touching this vital point, and of drawing all questions relating to it to his own decision, or commission; thus superseding the private pretensions of parties to redress their supposed personal wrongs by their own course or remedy; and assuming to himself to repair the injury suffered by the individual in feeling or in personal respect, by the standard of his own honour, or that of the community of which the king is the natural guardian or protector. For this purpose, his Majesty has been pleased in this Article, to put the commanding officer of a regiment or corps, in so far as respects the honour of the individuals attached to it, in the same relation with himself; in authorizing him to impose an arrest, and to judge of the apology or reparation that is due to an officer or soldier for any affront or insult offered to him, and through him to the common society of which he is a member.

There c n be as little doubt that his Majesty can communicate this power attached to his high military prerogative, as that he can immediately exercise it, if he should be so

advised. The instances above quoted declare beyond question, that the authority can be transferred, by commission, to others; and though in both instances such authority was intrusted to a general court martial, it has been shewn, that it was not used in a judicial way, nor was attended by any of the solemnities incident to a military trial; so as to render a court martial the sole and peculiar organ through which it must of necessity flow. It might have been confided, from any thing in the power itself, to any number of individuals of the army, more or less, as well as to the members of the court martial; but they were present, and were on that account selected, being a known and revered body of men, particularly well adapted to interpose in the existing cases.

The same authority delegated to the courts martial by the Crown, in the particular case mentioned, would seem to be *generally* committed, from his presence at all time, and official authority with the corps, to the commanding officer of every regiment, by virtue of the Article under immediate consideration *.

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* The principle of adjusting the personal differences of officers, when it may be allowable, by private explanations, is peculiarly recommended by the *Duke* of *Wellington*, and in a manner that would seem in a great measure to sustain the doctrine immediately advanced. Such an authority in a matter of military practice must be in a great degree decisive on the judgment of military men, and entirely so on that of the author.

In confirming the sentence of a general court martial, held at *St. Thomar*, in the month of September, 1810, on a *Captain W.* of the 3d battalion of the Royals, who had been tried and convicted of using disrespectful expressions to his commanding officer, and afterwards refusing to withdraw them, on the condition of being liberated from arrest, the Duke thus expresses himself:

" The commander in chief laments, that *Captain W.* should have thought " proper to defer, till he was brought to trial, to explain the disrespectful " expressions, which he made use of to his commanding officer, notwith- " standing the repeated offers made to him by his commanding officer to re- " ceive such explanation.

More pains have been taken to explain this Article, from a sense of its great importance, than may at first sight appear necessary; but the meaning and intent of it, owing perhaps to the brief manner in which it is expressed, would not seem to be generally or sufficiently understood.

It has been thought by some that the direction of the Article, as regards the remedy prescribed, is neither clear in itself, nor the means employed by it authorative enough to work the ends which it has in view. Now the redress or reparation to be required of the party offending, and as pointed out by the Article, is as plain and intelligible as may be; viz. the arrest of his person, and the requisition from him of a suitable apology for the wrong he has committed. It is not noted, it is true, how and by whom the arrest is to be imposed, nor in what way the apology is to be demanded; but as to the first, the general military practice may be presumed to govern it, which acknowledges the imposition of such an arrest by any one, party or otherwise, who is privy to an act, having a tendency to a breach of the peace; and as to the second, it may be enforced by the circumstance of

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"The officers of the army should recollect, that it is not only no degra-"dation, but that it is meritorious in him who is in the wrong, to acknow-"ledge and atone for his error, and that the momentary humiliation which "any man may feel upon making such an acknowledgment, is more than "atoned for by the subsequent satisfaction which it affords him, and by "avoiding a trial and conviction of a conduct unbecoming an officer.

"The commander of the forces requests that *Major-General Leith*, will "have this order read to *Captain W.* in front of the Royals, paraded for that "purpose, as the reprimand for his conduct."

In this case, the disrespect appears to have been shewn to the commanding officer himself; but the decision on it is only a modification of the principle, applicable to all cases admitting of reparation by other means than through the medium of a court martial. What a commanding officer is authorized to ask and accept as a satisfaction in general cases, he may, it seems, on a like reason, accept in his own, if there be no especial provision to preclude him from so accepting it.

the arrest; over which the commanding officer has a peculiar mastery, and which may be continued, with more or less severity, till it effect the desired purpose: or, the commanding officer being constituted the judge of the apology or the pardon to be asked, and necessarily armed with all the incidental authority requisite to the enforcement of it, is bound to employ it in such a manner as to give effect to the Article. With the latter view he may call the officer in arrest before him, and inquiring briefly into the case, dictate the honourable amends to be made, which the party offending will be obliged to make, or refusing to make it, to submit either to the continuation of the arrest, at the will of his commanding officer, or to the report, by the latter, if he should be so minded, of the contumelious conduct of the offender to a superior authority; or to the institution of a direct charge against him, for non-compliance with the regulation, contained in the Article. In one or other of these ways, the intent of the Article will be answered.

Others also have held, that the penalty, attached to the offence, declared by this Article, is only to be awarded, as are the general penalties denounced by the Articles of War, through the medium of a court martial. But there is not a word in the Article, which discovers any thing like an intention in the framers of it to call for the interference of a court martial in this the progress merely towards offence; or any other than a strong and manifest design to stop it by a direct act of power. It is founded on a preventive policy, which would be utterly defeated, if it waited for all the forms common to a judicial inquiry. It would be a perversion of the intent and use of *arrest*, if it should be considered here as a *consequence*, instead, as in ordinary cases, of a previous process to oblige a party to await and abide the sentence of the law military; inasmuch as it would have the effect of relaxing the security of the law, when it was avowedly the

object to double its precaution. Nor could the apology be in any way promoted through the sentence of a court martial, further than it might be urged through the dictation of the officer in command; as both in one and the other instance, it must depend for its accomplishment on the submission of the party offending, which, in the event of contumely, could not be rendered of any avail, but by the aid of the supreme power of the Crown paramount in every military emergency. It would hardly be worth the trouble of summoning a respectable and honourable court for the sole purpose of framing an apology which it had not the power to compel.

Viewing the article, in its first and plain sense, in the light of a legal provision, founded on common reasons, and to be enforced in an ordinary manner, it will be found to differ essentially from the general feature that distinguishes the rules among which it is discovered: but it is a provision, *sui generis;* and governed, as it has been attempted to be shewn, by its own particular principle. The whole of the Article emanates from the prerogative of the Crown, drawn forth on a peculiar occasion, and used in a special manner; and in the commencement, progress, and end, must depend for all its force on the royal prerogative, and on the prerogative alone.

From a misconception of the principle on which the Article is founded—and from doubts of the authority of the commanding officer under it, recourse has so seldom been had to it, that it has come to be regarded at length almost as an inoperative letter. The consequence has been, that individuals have either sought to do themselves right, in a point of wounded feeling, by the very means which this Article was framed to prevent; or, acting under the influence of the same passion, but with another direction of it, have pursued a remedy more consonant to the dictate of private

interest or revenge, under other Articles of War, that have in their contemplation the immediate punishment of parties, rather than the prevention of evil or the reformation of the offenders.

It has been usual for officers suffering under reproaches or provocations of other descriptions, that do not in their own minds demand a more immediate redress, to have resort to the 28th Article of the 16th section, or to the 2d Article of the 24th,—which may entail on the parties offending, when the offence shall be brought home to them, a more serious punishment in comparison of what might be inflicted under the summary operation of the 1st Article of the present section. An exemplification of this was exhibited in the charge preferred against *Ensign T. R. Delannoy*—of the following tenor:—" For highly disgraceful conduct, unbecoming the " character of an officer and a gentleman, in wantonly in- " sulting and using most unwarrantable language to *Captain* " *Macduff*, of the royal *Perthshire* militia, on the evening " of the 11th July, 1813, more particularly in calling him a " *coward*, being highly prejudicial to good order and mili- " tary discipline, and in breach of the Articles of War." On which charge, *Ensign Delannoy* was convicted and dismissed.

And another instance is afforded in the charge, among several others of a like nature, against *Lieutenant Dominick French*, of the 82d regiment of foot, viz.—" For unofficer " and ungentlemanlike conduct, in using abusive and pro- " voking language to *Assistant-Surgeon Scott*, tending to " excite him to fight a duel; and for *giving* him the *lie*, on " or about the 2d April, 1811." Of the latter part of which, and other branches of charge, the accused was found guilty, and cashiered. And again, in the charge instituted against *Lieutenant C. White*, of the 4th *West-Indian* regiment,— " For scandalous and infamous conduct, such as is unbe-

"coming the character of an officer and a gentleman, in "going into *Ensign Garratt's* room, and there using most "opprobrious language, upbraiding him with *being a* "*coward*, &c. &c." The charge being proven, the offender was cashiered.

Instances without number might be mentioned where parties have been obliged, from the disuse of the power in the hands of the commanding officer of a regiment, to assert their own honour through a public prosecution; always attended with much inconvenience and interruption to his Majesty's service, and often with the loss of an officer who might perhaps have been reclaimed and retained eventually to some useful and honourable purpose. Nor are cases wanting, of a different complexion, where individuals have been brought to trial for too much patience or forbearance under reproaches, as suggested in a solemn accusation, of a not less aggravated character than any of those immediately noticed—in the instance of *Captain W. Griffin,* of the 14th regiment of foot, viz.—"For scandalous and infamous be-"haviour, such as is unbecoming the character of an officer, "in having on or about the 27th October, 1809, suffered "the most gross, abusive, and opprobrious language to be "applied to him, by *Lieutenant Dove*, of his Majesty's 14th "regiment of foot, viz. '*poltroon* and *scoundrel*' (words "subsequently avowed by that officer), without taking such "measures as would have been appropriate to the vindica-"tion of his, *Captain Griffin's*, insulted honour and charac-"ter, and in flagrant breach of the rules of subordination "and military discipline, prescribed by the Articles of "War." There was another charge of a similar effect—of the whole of which *Captain Griffin* was acquitted.

Now if one might not feel any very great regret at the dismissal of individuals from the service, convicted of an offence, which cannot, under any circumstances, be regarded

with a very favourable eye; we may be allowed at least to lament, that an injured and insulted individual, may by possibility be exposed to a trial, under a most mortifying charge, the occasion of which might have been obviated, if the meaning of the first Article had been better understood.

Although this Article, for reasons before stated, has not been generally acted on, it has not at all times remained a dead letter in the Articles of War; but on the contrary, the force and spirit of the Article has been acknowledged, and the acts which have been executed under its authority have been solemnly noticed and sanctioned, to every legal intent, whenever they have individually come within the view of a court martial. On a recent occasion in *Spain*, *Captain J. Burdett*, of the 34th regiment, was arraigned, among other things, before a general court martial, at *Roncesvalles*, in the month of August, 1813, "of making use of ungentleman-" like, violent, and threatening language, to *Lieutenant T. M.* " *Simpkins*." But it appearing to the court martial, in the course of the evidence, "that the prisoner had suffered the " *penalty* of *asking pardon* of the party offended, at the re-" quisition and in the presence of his commanding officer, " in compliance with the Articles of War, specially made " and provided in such case," it acquitted him thereof.

As the especial circumstance of the prisoner having asked pardon, at the dictation of his commanding officer, had not been pleaded, the court could only have noticed it in the manner they have done, or declined to pass any sentence thereon.

The light in which the court would appear to have viewed the apology, *i. e.* in the nature of a *penalty*, corresponds with the construction which has been endeavoured to be put on it, throughout the observations that have been offered on this Article.

Some probable estimate might be formed of the numbers

of courts martial, that may have been assembled for the investigation of charges, originating directly or indirectly out of reproaches or provocations; but a conjecture even could not be formed of the many unfortunate quarrels, arising out of these fruitful sources of personal strife, that have been decided by another issue: the greater part, if not the whole of which, might have been prevented by the seasonable interposition of a local power, arresting and restraining the rising passion in its source—taking the cause of dissension from an unlawful to a lawful tribunal, and dictating a rational satisfaction, which the parties to the dispute were prepared not, from present irritation, on the one side to give, nor on the other possibly to accept. It is exactly in this situation, where reason loses her force, and law has little if any authority, that it becomes extremely desirable to employ the influence of station and example in the adjustment of nice and perplexing difficulties.

But it is not so much for the purpose of saving the multiplication of courts martial, the prevention of private quarrels, with their frequent calamitous consequences, or the preservation of peace within the military community itself, enviable as all these purposes must be, that I am anxious to recommend, as much as I am able, the jurisdiction of that domestic forum, which the paternal and benevolent disposition of the Crown has raised in the bosom of every regiment, for quieting and allaying the disturbed honour of its members; as that I am desirous of preserving, through the safe medium which it affords, the very principle itself, which is the great characteristic of the body at large.

There are certain things too high or too low for judicial cognizance; and under one or other of these considerations, which it might not be difficult to decide, the objects provided against by the first Article would seem to range.—Reproachful and provoking speeches and gestures, howsoever they

may be freely used and sanctioned in settling the animosities of some of the orders of men, are not among the instruments, one should imagine, that can come within the contemplation of the law of arms. In whatever way they are employed, they cannot be tolerated in the ranks of civilized society. If drawn forth in an *offensive* act, they discover the will, without the courage to attack, blended often with a cunning, to turn the aggrieved into the aggressor; to shift on a more generous adversary the danger of urging to a combat which injured feeling might think indispensable, but which wounded pride, acting on dull materials, knows not how to encounter as it should: or, if used in *defence*, they characterize a base and ignoble nature, which insult cannot rouse into self-respect, but which seeks to put itself out of peril, by placing itself below contempt, in the level of the unmanly and unmannerly assailant.—Opprobious and taunting speeches, with all the dumb eloquence of practical abuse, are the arts and property of the vulgar; and the progress of society has rendered them almost peculiarly their own. Such speeches are therefore left, in dubious cases, when it would be difficult to pronounce on which side the advantage or the injury might lie, not to the determination of a court of judicature, for they are below its concern, but to the more fitting authority and decision of the fish-market. Shall the ears of a dignified judicial body be exposed to the hearing of disgusting terms and acts, which cannot be mentioned without offence? Is it becoming, that a number of respectable men should be solemnly called together to investigate the loathsome particulars of a vulgar altercation among the members of their own fraternity; and to record the disgrace of their honourable profession, so far as it may be affected by the unworthiness of its constituent parts, in the face of the whole world? Or would it not be more decent, as far as it is practicable, to throw a veil over transactions so as to

screen them from the common gaze, instead of exposing them to the scandal of a society identified with and inseparable from the principle of honour? But the question is, not so much whether it be becoming, as whether it be necessary?

Now it has been shewn, or at least presumed, that the latter cannot be the case, so long as the first Article of the present section holds out the pointed and prompt means of redress for the injuries under consideration, through a forum, eminently calculated to promote the required amends, to correct by private but suitable humiliation the misconduct of the offender; to reconcile him to himself and those around him, and to preserve the character of a corps from reproach, through the impeachment of individual example.

This Article, if watchfully carried into effect, may operate to every one of these desired ends, and may be the means also of repressing those frequent excitements to private feuds, which, if not quelled in the instant of irritation, often transport men into eventual deadly conflicts, or into present extravagancies that sink the agents so low as to exercise and task the ingenuity of military courts to find the means of raising them to the consequence from which they had unhappily fallen*. It is in the immediate demonstration of rising ill-humours, when counsel or authority can usefully interfere.

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* A remarkable instance of this kind occurred in the late war in *America*. *Lieutenant-Colonel Walcot*, of the 5th regiment of foot, while encamped near *Boston*, was so unfortunate, in a hasty and intemperate moment, to be moved to strike a subaltern (*Ensign Patrick*) under his command; and notwithstanding the latter had challenged him, the lieutenant-colonel was brought to a court martial, of which *Brigadier-General Pigot* was president, for the offence, when the court, after due consideration, suspended him from pay and allowances for six months, and was further pleased to order that *Ensign Patrick* should draw his hand across the face of the lieutenant-colonel before the whole garrison, in return for the insult he had received.

It is on the footing of "*principiis* obsta," Beware of *beginnings!* that this Article is professedly founded. The commanding officer of a corps, an agent ever on the spot, is for that reason chosen to give effect to its provision, it being his peculiar duty and office to be vigilant in the preservation of the peace of the body intrusted to his charge. He is instructed, as the head of such corps, with an authority secondary only to that of the Crown, and with the fulness of the power he has a large correspondent responsibility in the neglect or misuse of it.

Such power and such responsibility could not perhaps be better illustrated, or the doctrine, which I have been endeavouring to inculcate, more strongly impressed, than by the observations made by the commander in chief, at the instance of his royal highness the Prince Regent, to the *Earl* of *Rosslyn*, commanding the *Kent* district, at the conclusion of certain courts martial, that had unfortunately occurred in his Majesty's 85th regiment, and had terminated most unhappily for the commandant of that corps, and relatively to every one of the officers attached to it.

"I have to transmit herewith," says his Royal Highness the *Duke* of *York*, "my separate letters, conveying a com-
" munication of the Prince Regent's approval and confir-
" mation, in the name and on the behalf of his Majesty, of
" the finding and sentences of the several courts martial
" which have been held within these few months upon the
" officers of the 85th regiment *; and I have to acquaint
" you, that his Royal Highness was pleased to remark, that
" from the whole tenor of the proceedings of the above-
" mentioned courts martial, but particularly of those on
" *Brevet Lieutenant-Colonel M'Intosh*, *Captain Hylton*,
" *Captain Meredith*, and *Lieutenant* and *Adjutant Connor*,

* *Brevet Lieutenant-Colonel M'Intosh, Captain Hylton, Lieutenant Powell, Lieutenant Cameron, Captain Meredith, Lieutenant* and *Adjutant Connor.*

" it appears that the most unfortunate divisions and dissen-
" sions have subsisted for a length of time past in the 85th
" regiment, to an extent which would seem to have sapped
" the foundation of discipline and subordination among the
" officers, to have destroyed their respectability, generally
" speaking, in the eyes of men, and to have rendered the
" services of the regiment in a great measure lost to the
" country.

" His Royal Highness was further pleased to observe,
" that in considering the cause which has led to these dis-
" orders, and the reports which have, from time to time,
" been made upon the state of discipline of this regiment,
" it is but too apparent that the spirit of party, which has
" in a great measure affected the whole corps, has been al-
" lowed to gain ground under an extreme want of firmness
" and consistency on the part of the commanding officer,
" *Colonel Cuyler*, whose acquirements and qualifications, as
" a commanding officer, are not of a nature to command
" such respect to his authority as would have been calcu-
" lated to repress the course of disorder that has disgraced
" the discipline of the corps, and have manifested his un-
" fitness for the discharge of the important duties devolving
" on him as the commanding officer of a regiment.

" It appeared to his Royal Highness to be unnecessary to
" enter into a circumstantial detail of the various occur-
" rences, wherein insubordination and disorder have been
" manifested under *Colonel Cuyler's* command, and where
" the interposition of a proper authority, enforced by that
" steady line of conduct which is required of a commanding
" officer, would have checked and eradicated, if not have
" entirely prevented, the existence of the evil.

" But taking into consideration the whole circumstances
" of the case, the Prince Regent was pleased, in the name
" and on the behalf of his Majesty, to command that an in-

" timation shall be made to *Colonel Cuyler* of the expe-
" diency of his retirement from the service :—In considera-
" tion, however, of the length of time he has served in the
" army, and of the cause in this proceeding, arising in his
" want of qualification for the command of a regiment, ra-
" ther than in any misconduct as an individual, his Royal
" Highness was graciously pleased to permit that officer to
" sell his commission as lieutenant-colonel.

" The Prince Regent was further pleased to remark, that
" the spirit of party which has been so long allowed to
" exist in the 85th regiment, appears to have taken such
" strong hold of the corps, as at present constituted, as to
" leave little hope that the exertions of any commanding
" officer could now remedy such deep-rooted evil, and bring
" the regiment back to a due sense of subordination and dis-
" cipline ; his Royal Highness has therefore been pleased,
" in the name and on the behalf of his Majesty, to com-
" mand that every officer, without exception, who has joined
" the 85th regiment, shall be removed or exchanged to dif-
" ferent corps in the service ; not only as an example to the
" army generally ; but in order that, by the introduction of
" other officers, no recurrence can possibly take place of
" those instances of dissension which have destroyed the dis-
" cipline of this corps, as well as the respect of the non-
" commissioned officers and soldiers for their superiors.

" In communicating this decision, I have received the
" Prince Regent's commands, to desire, that your lordship
" will at the same time explain to the officers, that it has
" been adopted as a general measure of expediency, and not
" intended as an imputation against any individual ; and that
" your lordship will assure *Brevet Lieutenant-Colonel*
" *M'Intosh*, and *Major Mein* in particular, that the mea-
" sure does not lessen the feeling of approbation under
" which their general services are appreciated ; and that due

"consideration is given to the very honourable terms by "which the courts martial have expressed their acquittals of "the charges preferred against *Brevet Lieutenant-Colonel* "*M'Intosh.*"

Though incipient quarrels may in most cases be happily stayed by the interposition of the authority of the commanding officer, and in the ready way explained in this Article; it yet does not follow but that individuals, in the event of any omission on the part of such officer to notice them, or of an aggravated case, when a mere apology might not of itself satisfy the injury sustained, may pursue their own remedy, under some other Article of War, more adequate to the end proposed.

ARTICLE 2d.—This Article subjects an officer or soldier, who shall *give* or *send* a challenge to any other to fight a duel; to the penalty, if a commissioned officer, of being *cashiered*, or if a non-commissioned officer or soldier, of suffering *corporal punishment* or *imprisonment*, at the discretion of a court martial.

The *pains* declared by this Article against the givers or senders of challengers, are as heavy as could well be devised, and more especially as they relate to commissioned officers, who may be supposed to have a nicer sense of feeling, and therefore more likely to fall into such excesses than those under their command, for the purpose of deterring them from embarking offensively in private quarrels. It is the object of this, and of the other Articles under this section, to resist any direct or indirect approach to duelling, in every one of its stages.

To bring the party within the peril of the Article, it is not material whether the challenge be accepted or not; it is enough if it be given or sent. The offence is in the excitement or provocation to quarrel, which is complete by the act of hurling the defiance; the same having a natural tend-

ency to stir up opposing passions, and consequently to lead to a breach of the peace. When the gauntlet is once thrown down, it must depend not on the challenger, but on the disposition of the party at whose feet it is cast, whether it be taken up or not, and produce the evil consequences which it is the business of the Article to prevent.

It will be for the court martial to consider, whether the words, spoken or written, but most commonly the former, in which the alleged offence is supposed to consist, import, in the opinion of the court, a challenge or not. In doing this they will have particularly to advert to the occasion on which they are spoken, and the intention, if it be apparent, with which they are delivered. These it will be more necessary to weigh even than the words themselves; for they may be purposely cloaked, as is usually the case, seeing that they cannot be lawfully spoken, under equivocal language.

No general description could be laid down of the precise words which amount to a challenge; for there is no particular phraseology, no set form necessary to it, or by which it can be known. Whether there be an actual summons to the field, either through the principal or a second—or such a defiance thrown out as shall appear a direct invitation to it, though it cast the burden of acting in all the circumstances conducive to the combat on the other party, it may be equally held in the nature and degree of a challenge. It is not requisite that there should be a formal invitation to fight; but a mere hint or suggestion that one of the parties is prepared for it, has been held by a court martial to be tantamount to a challenge. As in the message delivered by *Lieutenant S. Shawe*, of the second battalion of the 56th regiment, to *Captain Burns*, of the 84th regiment, to the following purport:—

" I wait on you by the desire of *Lieutenant Newman*, to

"say, that he considers you have insulted him, &c. &c., and "that he is ready to meet you; you formerly insulted me "also."

The words "if you are *offended*—you know *where* to "*find* me," have been deemed sufficient to sustain an indictment for a *challenge*, at common law.

It is not contended, that the court martial, in a matter of construction on the acts or words of individuals, in certain cases, is bound to conduct itself by the rules or notions of the civil courts; but it cannot be altogether foreign to their consideration, nor perhaps their duty, to learn, where they are each acting on the same principle of law, and on the same reason and policy, what the conduct and conclusions of the latter courts are.

The offence, embraced by the Article, is a provocation to fight; which is not in itself a breach of the peace, though it has a tendency to it, and is therefore criminal. If such provocation be by an express and direct call to the field, or by a circuitous course, so that it be calculated to defy or brave the adverse party thither, it is equally within the policy and scope of the Article.

There is no moral distinction in the act, which leads and is intended to lead to the same conclusion, whether it assume one way or another to effect its purpose; the intent of the act, and not the manner in which it may be brought about, constitutes the offence. In this view it is as much an offence to use words or insinuations, that indicate a disposition to fight; and which may act as a provocative and defiance to another to meet such disposition, as if the most unequivocal challenge were given. There cannot be a doubt as to the person who is guilty of the *first* fault.

The court, however, will have to decide, in those cases, where the challenge is not thrown out in explicit terms, whether the insinuations are such, as, in reasonable proba-

bility, would cause in a generous breast, a revulsion of the same passion, which is exhibited in the bosom of the adversary. It will have to consider, not whether the insinuations *must* produce a reverberation of the defiance, but whether they are offered with such intention and have a tendency to do so; and if satisfied of *that*, it can have little difficulty in considering them in the light of a challenge. The latter is not punishable only, because it is a breach of the peace, but that it may induce one.

Challenges, as it has been before observed, are for the most part couched in dark and ambiguous terms, to avoid, on possible detection, the consequence of the law. It would seem strange, that they, who are about to violate, in the most aggravated degree, the law of God, as well as man, by which they may entail on themselves the most awful of all punishments, should have, in the very instant of rushing into so daring a crime, so much worldly and personal caution about them, as to provide for a comparatively mean and worthless object. Yet there is a mixture of this false magnanimity and real littleness in this inconsistent act. Nor is it unfrequent either to behold, in these special invitations to duel, so courteous, and apparently so kindly a purpose, as if parties were called together to a friendly and convivial entertainment, instead of a banquet of blood. But under whatsoever fair a pretence shall lurk an intended allurement or provocation to private combat; the court, on detecting it, will be bound to characterize it with the term to which it is entitled, and to visit it with the punishment which the law military has attached to it. Ingenuity may sometimes frame the invitation, so as to envelope it in a studied and thick mysteriousness; but like all other artifices of fraud, though they are impenetrable enough of themselves, they are often rendered transparent by external and surrounding circumstances.

As the offence is in its nature a private one, there cannot

in many instances be expected any abundant evidence of it. The court therefore will have to govern itself not so much by the quantity as the quality of the proof. Such evidence as the offence will admit, the court, in common justice to the accused, is in every case bound to require, while, in respect of the law, and the interests it has in charge, it will not demand more than the thing can be expected to supply.

It may not be impertinent to remark, before the dismissal of the subject under consideration, that some sort of challenges are punishable with peculiar severity by the statute law of the realm, in addition to the penalty which may be inflicted by a court martial; those particularly that arise, a productive ground of strife, out of the disputes of the gaming table. By the 9th of Anne, c. 14. sect. 8, it is enacted "that if any person shall *assault* and *beat* another or "*challenge* or provoke him to fight, on account of any money "*won* by *gaming*, he shall *forfeit* all his *personal estate*, and "shall be *imprisoned* for *two years*." It is not necessary, in order to bring the offence within the statute, that the assault and battery or the challenge happen actually at the gaming table, or within any given time after the removal from it, it will be complete, let the assault or challenge happen where or when it may, from the doctrine acknowledged in *Daly's* case (4 *East*. 174), if it grow out of a quarrel about *money* WON at PLAY.

ARTICLE 3d.—The present article, founded like the preceding on the reason of the common law, carries the policy of it yet further; holding not only agents, such as him who bears the challenge, whether as a second or otherwise, and him who promotes it by any other means; but also *passive* parties, neglecting to use the force within their hands to stop persons intent on duelling, such intent being manifest, from going forth to fight, in the same degree of criminality, and subjecting them to the same severity of punishment.

The first branch of the Article declares—"that if any "commissioned or non-commissioned officer, commanding "a guard, shall knowingly and wilfully suffer any person "whatsoever to go forth to fight a duel, he shall be punished "as a *challenger*;" that is, in the one case by *cashiering*, and, in the other, by *corporal* punishment or imprisonment.

The essence of the offence is the non-exertion of a present power to prevent a known unlawful purpose. As it is the knowledge of the intention of the parties going forth, and the non-resistance of it, which makes the crime, the existence of such knowledge must be clearly evidenced before the court martial, ere it can pronounce any guilt.

It has been thought by a sensible, and it may be said, by a *learned* writer* on military law, that, under the term, "any "person *whatsoever*" the commanding officer of a guard is bound to stop persons of every other class, as well as the members of the military state, who are going forth with a public or known intention to single combat; and this construction would not appear to be forced or strained. The king being the general conservator of the peace, and having an equal interest in the lives of every description of his subjects, may be reasonably understood to have manifested the care, which this interpretation would imply. The guard, too, of a milirary station, fulfilling the office of police, together with that of defence, it might not be too much to require of the commander of it, the performance of the preventive duty of a peace officer, in restraining parties from carrying their unlawful intention into effect, to the disturbance possibly of the quiet of the station, as well as of the general peace.

But admitting the construction of this to be correct, there would seem no reason to conclude with him, which at the same

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* The author of a work, published by Goddard, 1810, under the title "Of the Military Law of England, with all the principal authorities, adapted to the general use of the army, &c."—p. 29.

moment he contends, that the term "any person whatsoever" has an equal or any application to the preceding Article; so as to allow the civil classes of the community to take advantage of it, if they should be so disposed, in the event of receiving a challenge from any officer or soldier, to bring the challenger before a court martial, instead of the ordinary civil courts. The words of the second Article *expressly* limit the challenge, which it purposes to punish, to the members of the military community. The giver and the receiver of the challenge are both described to be of the military condition, for such is the direct letter of the Article, viz.—"No "*officer*, &c. or *soldier*, shall presume to send a challenge to "any *other* officer or soldier." There would appear, therefore, nothing to warrant the inference, that any other than the members of the army were intended to be included therein; except that the Article is found in company with another provision, but having no immediate relation with the subject matter of the latter, which has a more general and extensive range*.

* There would seem as little reason as justice in admitting the civil classes, generally, to become suitors in a military court. The parties would stand there, in the first place, on a very unequal footing with respect to one another; the responsibility being all on one side. The court martial may punish one party, if he should be found to be an offender, while it can give no redress against the other, in a contrary event, for a vexatious or malicious prosecution. There is not either any more equity in the penalties to be awarded, than reciprocity in the distribution of justice, inasmuch as the military offender might be absolutely ruined in his fortune and his prospects by the adverse event of a prosecution; when a civil party would escape, in his own courts, with a nominal penalty. One need not go further than to advert to the misdemeanor of sending a challenge, which, in subjecting the officer to be *cashiered*, may act as a large pecuniary forfeiture, possibly of all he is worth, besides depriving him of the advantages of his previous service, and the future means of life, while it would expose the other to a trifling fine, and possibly a slight imprisonment. There would seem no fairness in the strife where the odds are so vast. The author has known instances of very unprovoked and wanton challenges, and of gross assaults committed by officers, wearing at the time their military uniform; and

The other branch of the 3d Article relates to offenders very distinct from those who are the objects of the first branch, namely, to *seconds, promoters,* and *carriers* of *challenges,* whom it deems to be principals, and punishes accordingly. The intent of this part of the Article is to discourage every act, through the dread of heavy penalties, which may have a tendency to provoke duels, making the remote, as well as immediate agents, alike obnoxious to the same pains to which the principals are liable. Of the different descriptions of persons, who are regarded by the Article as principals, though accessaries otherwise in fact, little need be observed.

By *seconds* are intended those, who accompany the principals, on one side and the other, to the ground on which the duel or the proposed duel is to be fought, regulating the terms of it, prescribing the course of proceeding, and seeing that they are strictly and impartially observed on both sides. They are commonly denominated, sometimes with no visible discrimination, the *friends* of the respective parties.

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of charges having reference to them, being afterwards preferred to the commander in chief on the spot; which were not however entertained by him, on the impression, and, as it would appear, a just one, that the matter, in respect of the *persons* implicated in them, belonged to another forum. It is not denied, but that the same violences, if attended by circumstances which are supposed to throw a discredit on the body of the army, might become the subjects of prosecution in the military courts; but then it must be on the relation of a military suitor; or possibly, after the common law courts have inquired into them, through indictments preferred for that purpose, they may be subsequently brought under the cognizance of a court martial, if any thing should turn out upon the trials, calling for such further proceedings, in interest of the concerns of the army, under the 18th clause of the Mutiny Act. Except in this way, it is hardly to be wished, from the reasons assigned, as well as for the additional trouble it would give to the military tribunals, that these mixed injuries should be brought before them. The common law is fully competent to redress the wrongs of those who are placed under its peculiar protection, and to whom the law military is, as it were, a foreign law.

They are the chosen and avowed judges; and are generally considered as guarantees for the equality of the combat; and have at times a higher attribute ascribed to them, and which in humanity we must always be inclined to believe, of mediating between and moderating the angry passions of the combatants. They are reckoned such indispensable parties to a duel, among those who favour this unhappy practice, that one is scarcely esteemed defensible without their presence*. But though this circumstance may take away a part of the ferocious character of the assault, it cannot in any way reconcile it to the notions of morality or law. No contrivance can make that tolerable, which is directly repugnant to command, divine as well as human. Let the practice and conduct of *seconds* be, therefore, what it may, they cannot be looked upon in any other light than as the abettors of an unlawful act, of the aggravated nature described. Nay,

* *M'Arthur* says,—"It is believed that there is no instance of an actual "execution in *Great Britain* or *Ireland*, in consequence of one party killing "another in a duel fought fairly, and on equal terms, and where *friends*, or "in other words, *seconds*, were called in to bear testimony to the equality "and fairness of the combat." He cites the case of *Major Campbell*, of the 21st regiment, as in proof of his assertion; the circumstances of which are in substance as follow:—On the 23d June, 1807, the 21st regiment had been reviewed—After dinner at the mess on the same day, *Major Campbell* observed to *Captain Boyd* and *Lieutenant Hall*, and the assistant-surgeon of the regiment, being all at the time together, that *General Kerr* had corrected him (*Major C.*), about the mode of giving the word of command for a particular movement, when he, *Major Campbell*, conceived that he gave it right: *Captain Boyd* thereupon remarked, that neither was correct according to *Dundas*, which is the king's order. On this some altercation ensued, in which *Captain B.* observed, that "he knew the order as well as any man." *Major C.* replied, "he doubted that much." *Captain B.* at length said, "he knew that better than him, let him take that as he liked." *Major C.* got up and said, "Then *Captain Boyd*, you do say that I am wrong?" *Captain B.* replied, I do—I know I am right according to the king's order.', *Major C.* quitted the mess-room.

In less than an hour after this altercation, *Major Campbell* and *Captain Boyd*, unaccompanied by any friend, met in a small room off the mess-room;

in the policy of the law, they may become the greater objects of punishment, in as much as they serve to keep in countenance a practice which, in its naked character, would be too barbarous to tolerate. If seconds would not lend themselves as ready parties to a duel, recourse, except in extreme cases, would not be had to it. In this view *seconds* are considered to partake of the guilt of their respective principals, and in the eye of the law martial, as well as the common law, in the *first* degree; of which the present Article is in some sort a proof. This principle is so far carried in the civil courts, that it yet remains unsettled, whether the second of a person killed in a duel may not be convicted of the murder of the deceased. And the better reason would seem to lie on the side of the affirmative of the proposition. There is something certainly more whimsical than solid in the distinction, which is the only one yet set up, as repulsive of the idea of the great ingredient in murder; namely, that the second could not be understood to go out with malice against that friend, in whose cause he was willing to risk his

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the corners in which each person stood, measured about seven paces, and each firing his pistol nearly at the same time, *Captain B.* fell, the ball having lodged in the cavity of his belly, of which he died in eighteen hours.

The verdict of the jury was against *Major Campbell*, and in consequence of which he was executed, though he had been recommended to mercy.

" The main point (says *M'Arthur*) on which the fatal verdict hinged, " was, that *Major Campbell* had time to cool after the altercation had taken " place, inasmuch as it was proved that he went home and drank tea with " his family; and that there were no seconds to witness the fairness of the " combat."

The jury assigned no reason for their finding; so that there is no means of judging of the weight given to the circumstance of the absence of the seconds. There were many things that might have operated adversely. For instance—the party had fled, and absconded from justice for several months, though he voluntarily surrendered himself up at last. And if the author recollects right, some evidence given by the messman, as to what he heard and saw, at the time of the duel, appeared to have great influence on the verdict of the jury.

life. But the undeniable fact is, that the parties to a duel, principals as well as seconds, go out on the business of death, and, so *that* ensue, it is no matter, in the moral eye, who it is that falls. Every one, in any way acting in it, will, in a legal if not a moral sense, be guilty of murder.[a] Guilt cannot be determinable by a mere matter of chance. It may be granted that the second wished, if for any, for the death of A, and not of B—but in seeking this the ball glances from A to B. Is he not as much a party to the murder, if it be such, as if the death had been on the other side? Both seconds go to the field, with the same intent; and can this be affected by an event in which, severally, they had nothing to do? An event too, in which duty and indemnity are at variance; the latter depending on the death of him whose safety it was the duty of the second, at all events, to promote. But beyond this, has not the second of B counselled and abetted him in the act, which led immediately to his death, not less than if he had aided or assisted, for it is a self-sought death, in affording the common means of suicide? These and other considerations will hardly admit a distinction between one second and the other. But be this as it may, they are considered, by the plain letter of this Article, to be in equal fault.

If seconds are considered such important parties to duel, it would seem to point out, that the law should direct itself against the *abettors* of the practice, as the best means of preventing it. To this end, perhaps, it might be enacted, that, both the seconds to a duel, though death or other injury should not result from it, should be liable to some notable punishment. It is no mercy of theirs, that the combat had a bloodless issue. There would be a difficulty in persuading men to undertake an office at such a peril; nor could they, in conscience, be solicited to it by the challenger, as it would subject his friend to greater hazard, in one event,

than he himself would have to encounter. But it might, it is true, make the practice of duel in some instances more fierce and sanguinary, but then it would render it less frequent; as it would be attended in all cases with far greater responsibility. In legislative measures to prevent crimes, no considerations of tenderness can interpose themselves to make a practice bearable, which under any and every circumstance is forbidden.

To solicit another to be a second, *i. e.* to be a party to an unlawful act, though it produce not the consequence desired, is criminal in itself. A court martial entertained a charge to this effect, in the case of *Lieutenant D. French*, of the 82d regiment of foot (though the party was acquitted of the fact), *i. e.* "for unofficerlike conduct, in endeavouring to persuade *Ensign Holgate* to be his second "in a duel," &c. &c.

It may not be so easy to assign a precise meaning to what is intended by the term "*promoters*," who are included in the same line with seconds and carriers of challenges. Such term, it is presumed, applies to parties, who, whether concerned or not in the matter of dispute, take any share in urging or provoking those, implicated in it, to send to one or the other a defiance to the field. The meddling and mischievous spirit which is ready to mingle itself in the misunderstandings and quarrels of others, is as often prejudicial to the best interests of society, as the bad passions of individuals immediately and principally engaged. This interposes itself, asked or unasked, in a variety of ways; sometimes in the shape of—"alleged feeling for the honour of the party or the corps;"—"of distressing doubts, as to the quality of the conceived affront; or what the world may think about it;"—"of nice and critical judgment of the meaning and extent of the expression used, or of facts that have occurred;"—"of recollected cases in point, or supposed to be in point,

which is just the same, that leave not any election of conduct;"—" of the strict notions of the adviser himself, over-nice, perhaps, but (which, God forbid! should sway!) as to what he should think *himself* bound to do under the like circumstances." At other times, when the passion of the parties requires not any cautious ministry, to shew itself in a hint of approbation on " the *proper* pride and spirit of his brother officer," or, possibly on his great and admirable good sense, in ascribing to him, " that he *must* know *what* to *do*"—or if he appears a little dull, he ventures to go so far, but that indeed very rarely, as to suggest, that the disinterested adviser " would undertake to deliver even a message to the opponent, if he did not unhappily stand in a very awkward and delicate predicament, having been engaged before in a like affair," but then " there can be no doubt of finding many other friends ready enough to embark in so honourable a cause."

It is to be remarked, that counsellors of this description are seldom either the carriers of the challenge or the ostensible seconds to the duel, which may succeed to it; though they may put in a very fair claim with either for a full participation in the merits or demerits of the consequences resulting from it. It is against this species of offenders, of whom a court martial cannot fail to observe some of the signs that are supposed to distinguish them, if they shall ever be brought before it, that the Article is pointedly directed, and no fitter objects for indignant animadversion can ever present themselves. That such persons are rarely to be found in the military community, it is charitable only to hope, and pleasing to anticipate, that their numbers are not likely to increase, from the well-known and well-timed severity of courts martial, in awarding to them their deserts, when they are discovered in their crimes.

That the head of the army is not less anxious, than the

military courts, to discountenance the interference of officers in the unhappy differences of one another; nor less discriminative in his reprehension, when such offence happens, may be learnt from the memorable order, published to the army, on the event of a trial for murder at a late assizes at *Winchester*, arising out of a duel, fought in the *Isle* of *Wight*, in which not less than four officers were implicated, and by a verdict of their country convicted of the crime specified in the indictment.

The commander in chief, having first stated that the trial of *Ensign E. M'Guire, Ensign J. Gilchrist, Lieut. A. Dillon*, and *Ensign D. O'Brien*, for the heinous crime of murder, had excited the liveliest interest and anxiety, directed the attention of the army in a G. O. to a letter of *Lord Sidmouth*, signifying the grant of the royal pardon to the parties convicted, enclosing a copy of the evidence on the trial, and intimating the persuasion of the Secretary of State, that his Royal Highness the commander in chief would be pleased to take such steps on the painful occasion, as the circumstances of the case should, upon consideration, be found to require.

In speaking of the result of the evidence on the trial in the court of common law, *Lord Sidmouth* observed, "From "which it appears, that the original disagreement between "*Lieut. Blundell* and *Ensign M'Guire*, arose from a trivial "cause; that no attempt was made to reconcile the parties, "but on the contrary, that instead of those efforts, which, "if properly and seasonably exerted, might have had the "happy effect of preventing the meeting, which led to the "fatal result, great pains were most unwarrantably taken to "instigate and promote it. This observation I am bound "to state, refers more especially to *Lieut. Dillon*, who "from his rank in the regiment, and his standing in the army, "was peculiarly called upon to exercise his influence and

" authority for a purpose very different from that to which
" they were applied."

His Royal Highness the commander in chief, having set forth *Lord Sidmouth's* letter at large, concluded in the following impressive manner:

" While the awful sentence of the law was pending, the
" commander in chief abstained from expressing any opinion
" on this most distressing occasion. His Royal Highness
" now feels it incumbent on him to take that part, which a
" due regard to the discipline and the character of the army
" demands.

" The commander in chief is sincerely rejoiced, that the
" clemency of his Royal Highness the Prince Regent, act-
" ing in the name and on the behalf of his Majesty, has
" been graciously extended to these officers, and has pre-
" vented their suffering an ignominious death.

" The offence of which they have been guilty, cannot,
" however, in a military point of view, remain unnoticed.

" On a due consideration of all the circumstances attend-
" ing this transaction, the commander in chief is induced to
" think, that of all the parties concerned, the unfortunate
" officer who lost his life, and the yet more unfortunate one
" by whose hand his comrade fell, are the least culpable;
" they appear not to have been actuated by any personal
" animosity, but to have been instigated and governed by
" the advice of others.

" The commander in chief is greatly concerned to ob-
" serve, that no such palliation can be adduced in the cases
" of *Lieutenant Dillon, Ensign Gilchrist,* and *Ensign*
" *O'Brien.*

" Their interference was equally uncalled for and un-
" necessary, and tended, not as might have been expected,
" to settle the trivial difference which existed between their
" brother officers, but to magnify its importance, and to in-

" stigate them to the measure, which has led to so fatal a
" result.

" The commander in chief therefore has it in command " to convey to these officers the highest displeasure of the " Prince Regent, for conduct so unmilitary and disgrace- " ful; and to notify to them, that they are no longer officers " in his Majesty's service; but his Royal Highness being " disposed in this decision, to attend to the distinction, " which appears in their conduct, and observing that *Lieut.* " *Dillon*, who, from his rank, and standing in the army, " ought to have set a different example, has throughout " taken the most prominent part in these outrageous pro- " ceedings, and greatly influenced the conduct of *Ensigns* " *Gilchrist* and *O'Brien*, is pleased to limit the declaration, " of being incapable of ever serving his Majesty in any mi- " litary capacity, to *Anthony Dillon*, late lieutenant in the " 101st regiment.

" The commander in chief directs, that this order shall " be entered in the orderly books, and read at the head of " every regiment and corps in the service. He hopes it will " prove an useful and an impressive lesson to the young of- " ficers of the army, and a warning to them of the fatal con- " sequences of allowing themselves to be misled by erro- " neous notions, and false principles of honour; which, " when rightly understood, and leading to its legitimate ob- " ject, is the brightest gem in the character of a soldier."

One word more on the promoters of challenges.—It has been laid down by *Lord Kenyon*, after two arguments, in the Court of King's Bench, in the King against *Higgins*, 2 *East* 5, " that the bare *solicitation* to commit a crime is a misde- " meanor, though the crime is not committed." And the learned editor of the last edition of the Commentaries, alluding to the authority of this case, states expressly, which would seem to bear on the subject now discussed, " that he

" who designedly attempts to provoke another to fight, or to " send a challenge, is guilty of the same offence."

Of the *carriers* of *challenges* a description is not required; the term bears along with it its own explanation. Where the challenge is in writing, it will be necessary to fix upon the bearer of it, in order to attach to him the guilt which the Article implies, that he knew the import of the paper with which he was charged; or otherwise he might be as little culpable as an ordinary letter-carrier, who cannot be presumed to understand the contents of the correspondence that passes, almost mechanically, through his hands.

ARTICLE 4th.—The common law authorizes private persons to interpose in an affray, which is described to be " the fighting of two or more persons in some public place, " to the terror of his Majesty's subjects;" and duels are holden as an exaggerated species of affray. The law protects the parties interposing, from all the consequences of acts bonâ fide executed, for the purpose of parting the combatants. It gives a more enlarged authority to constables and other peace officers, to the same effect, empowering them to break open doors to suppress an affray or apprehend the affrayers; and to carry them before a justice, or imprison them by their own authority, until the heat is over; and it is even said, that they may make the offenders find security to keep the peace—On a like principle the present Article is founded.

This Article declares, that officers of what condition soever, have power to quell all quarrels, frays, and disorders, though the persons concerned should belong to another regiment, troop, or company:—and to that end, either to order officers into arrest, or non-commissioned officers or soldiers to prison, until their proper superior officer shall be acquainted therewith; and ordaining, in order to make the interposition effectual, that whoever shall refuse to obey the

officer (imposing the arrest) though of *inferior* rank, or shall draw his sword upon him, shall be punished at the discretion of a general court martial. Former ordinances made the drawing of a weapon, under similar circumstances, a capital offence.

So nicely and vigilantly guarded is the quiet of the military state, that every officer, no matter what his condition or rank, is armed with an authority and consequently with a correspondent duty to preserve it. From the words of latitude in the Article, the non-commissioned is equally interested with the commissioned officer in the preservation of the public peace: there is no distinction between them. Nor is there any singularity in the provision, since a similar principle is acted on in the 3d Article of the present section; giving authority by a necessary inference, to non-commissioned officers, commanding guards, to prevent parties going forth to fight a duel, without any reference to rank.

The power given by the Article, is not only to suppress frays, but *quarrels* or *disorders*, that might *precede* or *follow* them; every thing being of material consequence, that has relation to the peace of the military community. The disorders here intended, are not those common declinations from the prescribed course or order of things, which general rules and a general superintendence are competent to guard against and repress; but such particular disorders as demand and call for a special interference, and more than ordinary instruments to abate them, from the danger to be apprehended from their continuance. The disorders, in the view of the Article, are such as have an immediate relation with quarrels or frays; being considered of so much danger, as to justify a departure from the principle of subordination, which governs in every thing else. The inversion of the right of command, arising out of the circumstance of rank, as favoured in this Article, is sanctioned only by the extreme

necessity of the case; for if it were regarded and acted on as a general provision, it would overturn the whole foundation of military command. It is the submission to a small evil, to avoid another in apprehension, if not in reality, of a much greater magnitude.

The assumption of a present command by the inferior is therefore tolerated, rather than the military state should be endangered by violent broils and distempers, that might, if unrestrained in due time, effect irremediable mischief. But as the assumption is of necessity, it is not allowed to continue longer than the necessity exists, that is, until the superior officers of the parties placed under arrest can be acquainted with the circumstance. The inferior officer, imposing the arrest, is bound to give such information to the proper authority, in order to the justification of his own extraordinary act, as well as on the principle, that every member of the military community is bound to inform, without loss of time, the commanding officer of circumstances having a tendency to threaten the general peace; so as to bring superior energy to the spot where it may be useful, either for the purpose of enforcing what has been done, or introducing fresh power, to further the measures already pursued.—This duty is particularly impressed by the the 4th Article of the second section.

A writer of some authority asserts, that it may be held as military law, not only that they who silently witness or conceal the crime; or who harbour or assist the escape of the criminal; but they, who barely *neglect* that essential duty of every soldier, to promote to the utmost of his power the strict observance of good order and discipline, for which the martial law supplies them with full authority, are guilty of a positive crime, and answerable for the punishment thereof to the cognizance and judgment of a court

martial*. Yet a certain prudence and caution may be requisite in the use of this very delicate and extraordinary power by the inferior in this case, so that it be not resorted to, except on an imperative occasion; and some circumspection also will be necessary on the part of a superior officer, under the concluding provision of the Article, how he ventures to resist it, when duly and seasonably exerted.

ARTICLE 5th.—The Articles, hitherto, have regarded the challenger solely, or those promoting his purpose: the present Article refers particularly, though not exclusively, to the person *challenged*. The several Articles aim at the same end; the prevention of the demand of private satisfaction, for real or imaginary injuries; the first, by the denunciation of the most exemplary punishments to all, who either as principals or accessories, shall be concerned in sending or delivering challenges: the latter in protecting and saving the honour of officers and soldiers who shall have courage to refuse the acceptance of challenges, from every species of reproach which might attend the refusal, by punishing those with the same severity as challengers, who shall upbraid them on that account; and by a solemn acquittal and discharge of his Majesty, speaking in his own name, and his character of supreme of the army, from any disgrace or opinion of disadvantage from an act, which is in conformity and obedience to his Majesty's orders, and their duty as soldiers.

The author of the Essay on Military Law†, alluding to this Article, remarks,—"As the practice of duelling is "founded on mistaken sentiments of honour, and supported

* *Tytler*, p. 197.—He considers that such alleged offence may be tried under the general letter of the 2d Article of the 24th section.

† *Tytler*, p. 192.

" by false shame, it has been laudably endeavoured, in the " framing of laws and regulations for the army, to check the " *practice* by counteracting the *principle.*

Now it could have been scarcely possible to have found out a more effectual mean of quieting a supposed shame, than by rendering it highly criminal in any one to suggest it, or a more safe correction of a mistaken sense of honour than is afforded through this Article, which not only exempts a non-compliance with this impression, from all disgrace and opinion of disadvantage, in the eye, so often deceptive, of the very soul and source of honour, but necessarily infers, that an opposite conduct in a soldier would have been inconsistent with the distinguishing duty of his profession.

These the positive regulations, contained in the Articles of War, are further promoted by a rule, imposed by the royal authority on itself, in the distribution of the patronage of the army, scarcely less yielding in the application than any of the Articles that have been successively considered, which excludes the members of the same regiment, wherein an officer shall be unfortunately killed in a duel, from succeeding to his vacant commission; a regulation taking away every possible interest which officers of the same corps might have in so adverse an event, and substituting, in its stead, a purer and better influence.

To the punishments awarded by the law military, and as declared through the Articles of War, against those who are directly or indirectly concerned in challenges, their causes or consequences, the common law of the land has added many cumulative penalties. Some of the latter have been already noticed, and others being intimately related with the subject of the present inquiry, fall naturally in this place to be considered. They cannot be deemed foreign to the purpose, since, in a moment of ungovernable passion, and from one rash and inconsiderate act, any member of the military

state may at some time or other be exposed to them; or, in the course of his professional duty, may be called upon, where no civil judicature exists*, to put them into force.—No apology therefore can be required for a slight notice of their origin or extent.

In a state of nature, we may observe, that individuals are left to redress the wrongs or injuries, done or offered to them, by their own hands. But in a civilized government, it is the principal end of its institution to protect its common subjects from the harm which they may effect or meditate against one another, by the fear of suitable penalties, to be inflicted not at the will of the parties injured, but by the order of the ruling power of the state. This proceeds on the principle of making the injury of any one part of the community, the injury of the whole, thus creating a social interest in each other's well-being, paramonnt to any private consideration. "Murder," says the learned commentator on the laws of *England*, "is an injury to the life of an individual, but "the law of society considers principally the loss which the "state sustains by being deprived of a member, and the per-"nicious example thereby set to others." "In these gross "and atrocious injuries (speaking of murder and other "felonies, he adds), the *private* wrong is swallowed up in "the *public*; we seldom hear of any mention made of satis-"faction to the individual; the satisfaction to the public "being so very great."

One of the first reasons for transferring, in a state of society, the right of punishing crimes, from individuals to the sovereign, is, the prevention of men from being judges in their own causes, which is the great evil that civil government is intended to remedy. The power of punishing offences is on this, and other very obvious accounts, vested exclusively in the chief magistrate, "who bears the sword of justice by

* Under the 4th Article of the 24th section.

"the consent of the whole community." It would be absurd to suppose, that this authority could be exercised by the state, through its first magistrate, and subjected at the same time to the resumption of individuals of their own will, whenever it should be thought more convenient to them.

"When punishment is the object—*this* the state is not "only, in its constituted ministers, the fittest judge to deter- "mine, but also the party most concerned to exact; for "punishment, be it observed, is a totally distinct thing from "reparation; and after the offence is committed, the person "offended is not more intimately concerned in providing "against a repetition of it, than any other member of the "community. The security of all is alike menaced, and that "can only be consulted for, with safety and effect, under the "direction of the power which guarantees its preservation. "This primitive authority, the savage, indeed, antecedently "to notions of civil confederacy, might frequently enough "exercise precisely to such extent, and upon just such "rightful claims, as the hottest rage of passion might sug- "gest; and to concede the exercise of the same to the indi- "vidual members of a social community, would be to per- "petuate, in civil life, those very passions which, in a savage "state, are most of all to be deprecated, by an inexhaust- "ible supply of their favourite aliment*."

If a renunciation of the laws of society could be endured, on any recognised principle, at the will of individuals—one law or other, as convenience should require, might be dispensed with, until it would become vain to look upon them in the light of social obligations at all; and men by imperceptible degrees would fall into the same barbarity, from which those laws, with a prudent and wise direction, had originally rescued them.

Duelling, therefore, as now practised, being a mode of

* *Ingram* on duelling.

seeking redress or reparation of a supposed or actual private injury, by the hand of the individual sustaining it, cannot in any contemplation be consistent with law; but must be counteractive of the general system of redress, ordained in a civilized state, and delusive of the authority lodged in the hands of the chief magistrate for the benefit of the society at large, and therefore highly criminal. It has been antecedently shewn, and therefore need not be more than briefly repeated here, that any act directly or remotely related with or tending to the encouragement of this practice, is considered as a very serious misdemeanor, and is punishable accordingly; such as the giving or bearing of challenges; the provocation or *attempt*, even, at provocation thereto.

But the offence, from its possible, nay, its very common consequence (the death of one of the combatants), may swell from a simple misdemeanor, into the most foul and heinous felony: one of the highest species of crimes known and punished by the law. In every such event, the survivor, and all other persons in any way aiding or abetting the act, will be called on to answer for the *homicide*, which in no case, having relation to duel, can be said to be justifiable; though under some and very rare circumstances, which it will be well to mark and to distinguish, may, by the indulgent allowance of the law, be possibly *excusable*. This can only happen in the case of SELF-DEFENCE; and that on a *sudden* rencounter. "The right of *natural defence* (according to *Blackstone)* does not imply a right of *attacking*; "for instead of attacking one another for injuries past or "impending, men need only have recourse to the proper "tribunals of justice. They cannot therefore legally exercise this right of *preventive* defence but in sudden and "violent cases, when *certain* and *immediate* suffering would "be the consequence of *waiting* for the assistance of the "law."

The learned judge puts some cases, by way of exemplification. "The law requires," he says, "that the person "who kills another in his own *defence*, should have retreated "as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; "and that not *factitiously*, or in order to watch his opportunity, but from a real tenderness of shedding his brother's "blood."

And again—"The party assaulted must therefore flee, as "far as he conveniently *can*, either by reason of some wall, "ditch, or other *impediment*; or as far as the fierceness of "the assault will permit him; for it may be so fierce as not "to allow him to yield a step without manifest danger of "his life, or enormous bodily harm, and then in his defence "he may kill his assailant instantly. But, if the person "assaulted does not fall upon the aggressor till the affray is "over, or when he is running away, this is revenge and not "defence*."

Under this excuse of *self-defence*, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an *assailant*, in the *necessary* defence of each other, respectively, are excused; the act of the relation, assisting, being construed the same as the act of the party himself.—On a parity of reasoning, might not the same excuse serve in the relation between officer and soldier, under like circumstances, as well as in some of the instances enumerated?

Every other species of *homicide*, that may happen in consequence of a private combat or duel, is criminal in the eye of the law, in a less or greater degree, according to the circumstances of the killing; *i. e.*, as they shall amount, in a legal acceptation, to the guilt of *manslaughter* or *murder*. The difference in those felonies, for they are both liable to

* *Blackstone*, vol. 4, p. 183, 184.

that denomination, is, that the one arises out of the sudden heat of the passions, the other from the malice and wickedness of the heart.

In illustration of this definition—*Blackstone* and other writers on the law, allege—" If upon a *sudden* quarrel two " persons fight, and one of them kills the other, this is *man-* " *slaughter*."

And so it is, if they upon such an occasion go out and fight in a field, for this is one continued act of passion; and the law pays that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt.

So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable, " *se defendendo*," since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice, but it is *manslaughter*. But in this and in every other case of *homicide* upon *provocation*, if there be a sufficient cooling time for passion to subside, and reason to interpose, and the person, so provoked, *afterwards* kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to *murder*.

No affront, by *words* or *gestures* only, is a *sufficient* provocation, so as to excuse or extenuate such acts of violence, as manifestly endanger the life of another *; much less any fatal consequence resulting from them.

The punishment awardable to the crime of manslaughter (which is a felony, but within the benefit of clergy), is burning in the hand, and forfeiture of goods and chattels. But by the 19th *George* the *Third*, the court, if it thinks fit, may impose a moderate pecuniary fine, in the stead of burning in the hand, and this fine will have the same legal effects and

* 1st *Hawkins*, P. C. 82.—1 *Hale*, P. C. 455, 456.

consequences, as burning in the hand; namely, the exclusion of the offender from the future benefit of clergy, on a second conviction of a clergyable felony, whether connected with manslaughter or not. For no one is entitled to the benefit more than once.

Homicide in consequence of duel, except when the rencontre, in which it happens, is sudden, and without deliberation, as in the cases explained, will amount to *murder;* and even in those circumstances where it may be viewed in the alleviated degree of manslaughter, it will be incumbent on the offender to make out the facts in evidence, on which his safety may depend, to the satisfaction of the civil or martial tribunal; which is to decide, 1st, whether the circumstances alleged existed or not; and next, whether as they are proved, they constitute such a defence, as to qualify or mitigate the guilt which homicide otherwise implies. For all homicide is taken to be malicious, until the contrary is shewn or proved.

There will be always, therefore, a fearful burden on the survivor from a duel, to produce and offer such proof of the particulars of extenuation as shall be sufficient to satisfy a jury or a court martial of their existence, and of their sufficiency to qualify the crime; for it may often happen that the fevered mind of the party himself may take a very different view of facts, than what they will bear in the eye of temperate and dispassionate judgment; or possibly from the privacy of the combat, as it most commonly occurs, there may be no witnesses of the circumstances of it that the law can hear; so that he might find himself in the hour of need, without a particle of legal defence, or a circumstance of palliation; and therefore liable without any mitigating consideration to a conviction of *murder*.

The killing, it may be observed, must be with *malice propense*, or *aforethought*, to constitute murder.

Malice, in a legal sense, is, when one, with a sedate, deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances discovering the inward intention, such as lying in wait, antecedent menaces, former grudges, and *concerted* schemes to do him some bodily harm *. To leave nothing for doubt, as to whether killing in duel comes within the legal description of murder, it is only necessary to add from the same author —" This takes place in the case of deliberate *duelling*, where " both parties meet avowedly with an intent to murder; " thinking it their duty, as gentlemen, and claiming it as " their right, to wanton with their own lives and those of " their fellow-creatures; without any warrant or authority " from any power either divine or human, but in direct contradiction to the laws of God and man; and therefore the " law has justly fixed the crime and punishment of murder " on them, and on their seconds also."

Whenever two persons in cold blood meet and fight, on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alleging, that he was first struck by the deceased; or that it was his only intent to vindicate his reputation; or that he meant not to kill, but only to disarm his adversary; for since he deliberately engaged in an act highly unlawful, in defiance of the law, he must at his peril abide the consequences thereof †.

So, if two persons quarrel overnight, and appoint to fight the next day; or quarrel in the morning and agree to fight in the afternoon; or at such a considerable time after by which, in common intendment, it must be presumed that the blood was cooled, and then they meet and fight, and one kill the other, he is guilty of murder.

Whether the party challenging, or the party challenged, kills his adversary, under the circumstances just described,

* *Blackstone*, vol. 4, p. 198. † *Hawkins*, P. C.

it will be equally murder. This was ruled long ago in the case of *Taverner*—to which *Mr. Justice Grose* particularly referred in pronouncing the sentence of the Court of King's Bench, in the case of the King against *Lieutenant Rice*, for challenging his superior officer; delivering himself in the following strong terms:

"This offence in modern times is so frequent, that it is "become alarming to the public, and induces to suspect, "that men either are not aware of the consequences that "the offence may lead to, or are become insensible to the "mischiefs of them. That fighting a duel is a grievous "breach of the peace is undoubted, and that it ought to be "so considered is as clear: inasmuch as it may lead to one "of the worst of crimes, *murder*; the murder of one pro-"bably, and possibly of more. I lay stress upon the word "*murder*, because I fear some are ignorant, and others will "perversely not understand, that to kill a man in a duel "amounts to the crime of deliberate murder, whether he "that gave or he that accepted the challenge fall. To "every lawyer this is a proposition perfectly clear; but that "others who are not of the profession may as perfectly be "assured of it, I will read only a passage or two from the "most able writers upon the subject, to shew that it is a "doctrine not of modern date, but coeval with the first in-"stitution of our laws. By *Sir Matthew Hale*, as correct, "as learned, and as humane a judge as ever graced a bench "of justice, we find it laid down *, that if A challenge C to "meet in the field to fight, and C decline it *as much as he* "*can*, but is threatened by A to be *posted for a coward* if "he meet not, and thereupon *A and B his second, and C* "*and D his second, meet and fight, and C kill A, this is mur-*"*der in C and D his second*; and so ruled in *Taverner's* "case †; in which case, tried before this Court of King's

* 1 *Hales*, P. C. 452. † *Rol. Rep.* 360. *Bulstr.* 171.

"Bench, in this place, it appeared that the deceased was "the CHALLENGER, and that the prisoner accepted the "challenge, as the case terms it, *upon very forcible provo-* "*cation. Sir Edward Coke,* the lord-chief-justice, laid "down the law thus*: 'This is a *plain* case, and *without* "*any question;* if one kill another in fight, upon the provo- "cation *of him that is killed,* this is murder.' Of the same "opinion were the rest of the court. In this case it is to be "observed, that the second one *Thomas Musgrave,* as well as "the principal, was convicted, and the other second was out- "lawed. This precedent may well deter others from taking "upon them so illegal and improper an office. And such "has been the law recognised at different times down to the "present moment, as we may observe by what is laid down "by a very learned and able judge † of the last reign; his "words are 'that in all possible cases deliberate homicide "upon a principle of revenge, is murder; *for no man un-* "*der the protection of the law is to be the avenger of his own* "*wrongs.* If they are of such a nature for which the laws "of society will give an adequate remedy, thither he ought "to resort; but be they of what nature soever, he ought to "bear his lot with patience, and remember that vengeance "belongeth only to the Most High."

The law so abhors all duelling in cold blood, that not only the principal who actually kills the other, but also the seconds are guilty of murder, whether they fought or not; and some have gone so far as to hold, that the seconds of the person killed are also equally guilty, in respect to that countenance which they give to their principals in the execution of their purpose, by accompanying them therein, and being ready to bear a part with them; but some have thought it too severe a construction to make a man by such reasoning the murderer of his friend, to whom he was so far from in-

* 3 *Bulstr*, 172. † *Mr. Justice Foster*, C. L. 296.

tending any mischief, that he was ready to hazard his own life in his quarrel. The latter is but the humane interpretation of an individual, and by no means a general and admitted conclusion, the point being yet unsettled by any solemn decision.

On an indictment at the Old Bailey, in September, 1802, *Henry Rea* was charged with the murder of *John Breamer*, in a duel, which took place at the *Cape of Good Hope*; and *J. G. Beaumont* and *J. Morgan*, the seconds, were charged with having been present at the time, aiding and assisting the prisoner *Rea*, in committing the alleged murder. When the evidence for the Crown had been closed, the counsel for the prisoners submitted, that, with regard to *Beaumont* and *Morgan*, the case was not such as should go to a jury, for that it was a disputed point of law, whether the second of the deceased was guilty in the same manner as the other second. And that it did not appear by the evidence on the part of the prosecution, which of the two, *Beaumont* or *Morgan*, was second to the deceased. In support of this doctrine the counsel for the prisoners quoted several authorities.

Baron Hotham, in summing up the evidence to the jury, replied to the objections of counsel, and observed, that the opinions which had been cited to shew, that the second of the deceased was not a principal in the homicide, were by no means decisive; they certainly were not his own opinion. This was a question, however, which could not be determined in that place; when it should be fit to decide it, it must go to the determination of the twelve judges. But there could be no doubt from the evidence in the case, who the second of the deceased was here; so that the point need not be then mooted.

In this uncertainty the point is understood to rest at the present day.

The practice of duelling, leading to and involving the crime of murder, is not less repugnant to the divine command, as expressly pronounced in the decalogue, than to the positive rule, as it has been shewn, of human institution; nor léss in defiance of the first precepts of the Christian religion; inculcating patience under wrongs, brotherly affection and forbearance one towards another, respect and reverence to rightful government, and explicit obedience to the dominion of the law; a reverence, reflected back by the law of *England* on that blessed religion, in piously identifying it with the letter of the law itself. And yet, divine command, the denunciation of future and everlasting punishment, the influence of the doctrine of Christ, and the more impressive lesson of his example, with all the restrictive authority of human law, and the dread of present vengeance, are all ineffectual to stop this barbarous, most inhuman, and most irrational practice.

There is unhappily too much proof, that the fear of remote punishment has but a secondary influence on the conduct of men, in restraining them from the commission of crime; but the terror of the impending sanction of a present law, duly and impartially administered, has seldom failed to actuate the human bosom, in swaying it on the side of right. How comes it, then, that such latter influence has not been felt in the case of duel? Is it that the law is defective or obscure? Or that the administration of it, in a country proverbially distinguished for the pure and faithful dispensation of its blessings, is, in respect to this particular crime, singularly imperfect? The answer to the latter question must embrace the affirmative implied in it. It is as true as it is lamentable, that there is a most wayward disposition in those who are the immediate judges of the facts constituting this crime (juries as well as courts martial), to regard them with such an eye of favour and indulgence, as to overlook, in a blind and perverse partiality, every thing criminal which the plain

and unsophisticated letter of the law would impute to them; though the same eye would be the most quick-sighted and steadfast in descrying and detecting every other species of crime or immorality; thus preparing the way for the visitation of the law in its utmost austerity. From the failure in the application of the law to the correction of this offence, it has been suffered to go unbridled, and at large, so as to ensure itself a *kind* of *immunity*, and not only to claim a prescriptive exemption from punishment, but to pass for a custom, as it were, of toleration, if not of legal allowance. From the latter consideration, some grave sages of the law, and some of the most distinguished teachers of morality, to the great danger of their office and reputation, have been led into a momentary indulgence of the crime, under the impression, that it had been so countenanced by use, as to have become, if such a term may be admitted, a *necessary evil*; so long at least until some lawful expedient should be devised, which assuming to itself a right of decision on all the possible subjects of private quarrel, should do away the presumed necessity of a resort to private combat. As if *evil*, under any cloak, could be acted on as a principle of legal adjudiciation, or as if any custom could be pleaded in opposition to the direct and express letter of the law.

What is there, it may be asked, so admirable in the custom, that should render it an anomaly, in legal consideration; and make it hold its place in society, in violation of the very first principle and foundation of all social order? Whence is it that men shall claim, and that others shall be found weak enough to hearken to such a claim, so as to lend it the slightest countenance, to be the judges in their own cause, where the passions too are likely to have the most unbounded sway; and when, from the fear of the same influence, it is the prime and dearest care of social union, to exclude them from such an assumption, in any matter of the most trivial importance? It

cannot be said, that the interests involved in the observance of the custom are too low for the protection of the common provision of the law; for what can exceed in value, in a moral or social estimation, the life of man? But it may be alleged perhaps, and with truth, that the affairs which may draw such interests into hazard, are intrinsically so unimportant, that social law will hold no cognizance of them. But then it hardly will be affirmed, that on this account, that custom, usurping the place of law, is to give an exaggerated importance to matters which in themselves are so insignificant, as to be beneath the contemplation of rational legislation. Can it for a moment be endured, that because the law respects a wrong, so trifling in itself, as to call for no distinct or specific remedy; that it shall therefore grow into so much consequence with individuals, as to authorize them to take into their own hands the redress of the injury by those very means which the law can only have recourse to in the last extremity? It would be the highest reproach to the code of any civilized society to admit such a supposition. If the wrong stood in need, in any reasonable view, of so serious a redress, it would have demanded, in the natural order of things, the attention of the legislative power of the state; and if it met it not, the conclusion would be, on a common principle of reasoning, not that it was above, but that it was below the legislative care. But be it of this or that consideration, it is an unquestionable truth, that in a state of society, whether in a case of positive regulation, or where there may be supposed to be any omission or defect, individuals are equally precluded from seeking a remedy for themselves. Or if it were otherwise, the rule of law would be conclusive only so long as men should choose to abide by it in the one case; and in the other nothing more than the substitution of the will of an individual, for the measure of law, both for himself and for his neighbour;

the very idea of which is repelled by the leading principle of the social compact.

There is nothing that can justify the pursuit of private revenge or private reparation in one case in preference to another; and to admit the right once, would be to subvert the very foundation of the whole system of public justice. Least of all could there be a pretence of breaking through the fences thrown around society, by the admission of an exception in favour of the practice of duëlling; since that very practice formerly partook, in less civilized, and less informed times, of all the nature of the present course of private combat, with the additional forms of a judicial proceeding; conducted in the most solemn and impressive manner; but was abolished with contempt, on the dispersion of the darkness of the unenlightened ages, from a conviction of the absurdity of the practice, and of its utter incompetency to the end which it was superstitiously intended to promote. It was a trial of bodily strength or individual skill, before which justice and right were obliged to bend the knee, unless gifted with superior prowess. As equality in the decision of right came to be understood and valued, such an abomination in judicature was naturally driven from the courts. And it is surprising, that a relic of it should be suffered to remain, but much more so, in the progress and march of civilization, that a custom, drawn from these rude usages, should be set up to undermine the fair and well-ordered system that has succeeded to them, and to call back, in the very inverse of improvement, the gloom and horrors of uncultivated and barbarous times.

Such however is the indulgence shewn to a practice anciently exploded as intolerable in a state of semi-barbarism, that it is suffered to be retained from some unaccountable notions or other entertained of its supposed virtue or necessity, in an age of the highest comparative civilization, at the

expense of common sense, and perhaps, it might not be too much to say, of common honesty also. For men most just and conscientious in the performance of their general duties, both to individuals and society, in the due discharge of the important function of jurors, and in instances, often where they are obliged to call into exertion almost a Roman virtue, will, seemingly without the least scruple, or struggle, so compromise with their consciences and their oaths, in a case of duel, as to ascribe a quality to facts connected with it, which they know does not belong to them, and cannot be induced to acknowledge in mere and indefensible pity to a criminal, what the law, in the protection of the primary rights of society, has declared to be a most wicked and flagrant crime.

It is wholly incomprehensible, on what principle it is, that could bear the view of day, on which men, otherwise mindful to the utmost strictness of their words, should here think themselves absolved from the binding obligation of their oaths; which, in engaging them to return a verdict according to the evidence, implies, in the common and undoubted meaning of the term, a reference to law as well as fact, where they are both clearly and unequivocally known, and where they together work the crime contemplated, or form an excusable or innocent act; and any evasion of the oath, no matter with what motive, is a moral, if not a legal perjury.

Some, perhaps, may be led into this error by an over-tenderness of conscience, rather than corruption of the understanding; but it may not be unseasonable to remind them, that in assuming to themselves the right of softening the supposed rigour of the law, as applicable to the circumstances of a particular case, they are invading, without the pretext or colour of an excuse, the province of a power in whose hands the prerogative of mercy is constitutionally placed, and by which alone it can be safely and beneficially exer-

cised. It would be a libel on the sovereign to suppose, sworn, as he is, on entering on his high office, to temper justice with mercy; aided also by the most able and conscientious advisers in the exercise of its transcendant duties; that he should be inattentive to or unmoved by those circumstances, which in the minds of an upright and discriminative body of men, would lead them to draw distinctions, either in diminution of the crime alleged, or in alleviation of the guilt of the criminal. The Crown cannot want the aid, nor can it receive any grace, from an officious and obtrusive interference with its legitimate functions.

Others, there are, who, without even the claim of an amiable though inexcusable weakness, oppose their own frail notions of what is right, to the collective wisdom of the law; and seeing nothing to condemn in a practice which outrages the plain letter of the divine command, and of human institution, permit the agents in this common work of death, to pass unstigmatized and unhurt from their employment, to meditate new mischief and to consummate additional crime.

" At the hands of such arbiters" (it has been asked) " is " it not to be feared, that, before the tribunal of conscience, " and of God, the blood of many may be required the " shedding of which they may not even live to behold? for " nothing can be more obvious, than that an unjustifiable " acquittal virtually operates as the sentence of death to " many who may hereafter fall premature victims at the " shrine of triumphant folly—victims, not simply urged to " destruction by their own rashness, or that of their antago- " nists, by the intemperate counsels of ardent friends, or the " dreaded scorn of opinionative companions; but gravely ex- " horted thereto by the deliberate decisions of courts of judica- " ture. Still should it appear that, in any case, the laws have " thus been lost sight of by persons sworn to enforce them,

"and the only rules by which they were bound to direct "themselves, forsaken—instead of putting the harshest con- "struction upon the proceeding, which would neither be "just nor necessary, let it be admitted that the instantaneous "motions of a tender conscience were obeyed, and that the "overruling bias was no other than the kindly impulse of "humanity itself; a conscience, it must however be as- "serted, but little informed by serious reflection; an hu- "manity of feeble policy and contracted views. For, in real "estimation, what is that humanity, which, engrossed in "the patronage of an individual culprit, is inadvertently bu- "sied in perpetuating a practice unhappily too frequently "recurring to be viewed otherwise than as a familiar object, "but in its true merits fit to be regarded by the arch-enemy "of humanity alone without regret and horror?"

It is not necessary to enter into all the considerations that may induce men to view the practice of duelling with a compassion which they withhold from the great mass of unlawful acts on which they are required to exercise a judgment; but the most plausible and favoured opinion is, that, in the present condition of society, some legal means are wanting, and which the ingenuity of social law has not yet been able to furnish, to protect men from affronts of a particular description, which, if they effect not any immediate personal injury, yet so wound the feelings of the internal man, as to occasion all the pain and grievance incident to a bodily wrong. Such injuries, from their very nature, must be open to erroneous conclusions; depending not so much for their character on the mind or deed of the agent, as the temper or sensibility of the sufferer. They may be aggravated or alleviated in their circumstances, either from the irritated or blunted state of the feelings of the party injured at the time of the injury. They must be of that subtility, that no man from his own sensations can presume to draw any inference

of their extent, for what two men think exactly alike? Is it surprising, then, that there has not yet been devised any fixed, available remedy for an evil, so insubstantial to the touch and so imperceptible to the sight? But it has been thought, that the happy contrivance of individuals is competent to supply a specific remedy for an ill which had mocked the skill of the most scientific legislators of different ages and countries, in the law of duel, or as it is more frequently called, the law of honour. This, in contradistinction to the common course of legislation, which acts on a general rule, proceeds on a partial principle, or one of partial operation; applying itself to a very small portion of the community, overlooking as beneath its notice the common herd of men.—No wonder then that the ordinary law, by which they are governed, should, in turn, be very sparing of regard for an institution so opposite in its very essence to its own! Nor is this law of honour less singular in its provision than its application. The common aim of the penal law in general is, to award a certain punishment to evil doers, adapted to the quality of the crime; but here every crime, be it what it may, qualified or unqualified, simple or aggravated, is liable to one and the same measure of vengeance. And this again is subject to a still more whimsical and fanciful distribution. It may be allotted, as chance shall have it, to the criminal, as the wages of his crime; or, to the innocent, as an accumulation of his suffering—according to the wild direction of the *bullet*, or the point or parry of the iron—the guilty and guiltless being placed, in the indiscriminative tenderness of the law, exactly on a footing of equality, and in a happy but unparalleled indifference, are the common undistinguished objects of its concern.

This is a mere outline of the features of this extraordinary and eccentric law; which stands aloof from every other legislative production; and is not ever likely to be incorpo-

rated with any, until right and wrong shall be so closely confounded, as not to be distinguishable from one another.

In the absence, however, of a common legal provision for the reparation or redress of personal affronts, in ordinary society, which is said to be the case, this law of honour is thought to have its use. One certainly cannot reckon among its advantages, the opportunities that it affords for thinning society of its numbers, which it may please to take away. What then is it that constitutes its chief and estimable use? It secures, or so it is said, the order and civil intercourse of society, by imposing a check on the unruly and ungovernable, who otherwise might offer insult with impunity; for that the dread of being called to account, through the medium of duel, for a breach of manners or decorum, operates in restraint of affronts, and keeps society free, in a certain degree, from such offences. Thus it is supposed to arm the weak against the strong; but it arms them equally: and will not the same relative difference between the two exist, after they are thus opposed to one another, as in their original condition? It will be seen at a glance, that it throws on the offended party the principal burden, and responsibility of the act, and of the consequences resulting from it, and if he shall happen to possess just sufficient of active spirit as to induce him to repel the offered injury, at the required hazard, the proposed end, in the institution of the duel, may be understood to be so far answered. But how, if a portion of such spirit should be wanting, where the affront is offered, or if it should be moderated by external considerations, of which many may suggest themselves with a force scarcely to be resisted; such as a sense of religion, of law, of the ties of affection, blood, of connexion, of location, of general duties, of particular obligations, with some one or more of which most men may, without the imputation of want of proper spirit, be more or less influenced. How if one or

other of these dictate a silent forbearance of the affront, will this boasted remedy succeed? Instead of checking, it will have the effect of encouraging provocations and insults, inasmuch as insolence and arrogance naturally encroach and presume, in the proportion as they are unresisted: so that in the end they may drive from the comforts of social communion, the modest, the sober, the meek, and the rational, who may be estimated, it is hoped, as a numerous, as well as a valuable part of society; and suffer none to partake of the benefits of an open intercourse, except they are disposed to maintain it with arms in their hands, or a weapon by their sides.

If the law of honour, therefore, tend to check one species of tyranny, it may be said to introduce another of greater intolerance, and as respects society, of far more prejudicial influence.

But the practice of duelling is to be endured, and further its apologists do not claim, so long only as there is no other means of redress for wounded sensibility, or impeached or disputed honour; for which in the common ranks of society there is supposed at present to be no legal or known remedy. When it is said that this practice is to be tolerated, it is not to be understood that it is so tolerated of the law, for by *that* it cannot be recognised for a moment on any reasonable or maintainable ground, but on the pretence of a plausible necessity, till "a method be found out of compelling the "original aggressor to make some other satisfaction to the "affronted party, which the world shall esteem equally reputable, as that, which is now given at the hazard of the life "and fortune, as well of the person insulted, as of him who "hath given the insult*.

Certain refined notions, current with a particular class of mankind, have established that such affronts as are above

* *Blackstone*, vol. 4 p. 198.

or beneath the law, are not therefore beyond remedy, but are cognizable within their own bosoms; and to submit with patience to them infers a want of courage to seek satisfaction where alone it may be found.

The custom of duel is defended, then, on the supposed absence of a lawful mode for the redress of affronts or insults, and the recourse to it is justified or attempted to be justified, on the fear, that a forbearance from it, under circumstances of offence, may induce an imputation of the courage of the party so submitting, to his dishonour in society. So that if in any offence there should be other remedy, or if circumstances should exist so as to repel the inference of the want of becoming spirit in the non-resentment of an affront by the means of duel; the reason for it, even on the avowed ground on which it is defended, will necessarily fail.

Now what I have ventured to remark on the custom of duel, has relation to it in general, and not in particular application as it concerns the military state, to which my observations ought in strictness to have been confined, and to which I shall endeavour to restrict them hereafter.

But it is a common understanding, that in respect to this unhappy custom the members of the army are involved, more than any other description of the king's subjects, in those necessities and difficulties, and those reasonings to which they give rise, so as to make the resort to it a matter of compulsion rather than of choice. From this conclusion I must most sincerely and strenuously dissent; considering that their professional destination, so far from increasing the inducements to this pernicious practice, absolutely removes the principal causes, that have weight with others, in giving it its only countenance.

I am aware how necessary it is that the principle of honour should be cherished by the soldier, being the most

valuable distinction of his condition. It is the grand motive, the indissoluble bond of his service to his king and to his country. It is this that leads him to face difficulties as the ordinary occurrences of his daily contemplation, in a countless variety of shapes; in which the chances of the field, though they form a part of his hazards, sink almost into nothingness compared with the crowd of threatening dangers, incident to and inseparable from his general duty. Life itself is not excluded from the voluntary devotion which he makes to the public safety, and life, when he enters the military state, is no longer his, but at the disposal of the call of his country, come when and how it may. From such a generous sacrifice, it is impossible to disjoin the idea of the most sublime and distinguished courage. Nor can it be dissociated from the most undistinguished member of the profession.

If courage be so general and so indispensable a quality in every member of the military community, how is it possible that any inference of prejudice could be entertained of it; if the necessarily-presumed possessor should on any petty personal provocation forego the temptation to private reparation or redress through the prevailing custom of duel? Might not such a forbearance, the presumption of courage being as it has been shewn, in favour of the profession at large, and as common to soldiers as the uniform that clothes them, be more naturally set down to a sense of a preferable demand on his valour, than to suffer it to be exhausted or thrown away on what to him must appear, comparatively speaking, and with regard to his public duty, a worthless and selfish object? Whatever may be the inference, from the patient endurance of affronts by ordinary individuals, is refracted by the circumstance of the soldier's duty, and the manifest condition of his service. One, therefore, of the leading inducements to duel, cannot or ought not to have

the least influence with a soldier, whatever it may be supposed to have with other classes of the community.

But the honour and reputation of a soldier is not permitted to rest on the support of any inference, however natural and however irresistible. As it is his dearest possession, so is it protected by the most attentive regard. Hence have been framed all those precautionary Articles and Rules which have been noticed in a preceding place, to preserve it from assault. With the same respect, the most positive injunctions have been issued, under severe penalties, against the sending or giving of challenges. So that the military challenger, so far from affording by his challenge any allowable proof of courage, gives a reason rather for suspecting it; since he knows it to be the duty of him to whom it is addressed, and who is absolved from every possible impeachment and disadvantage, in the refusal, to refuse and decline it.

Not only are all taunting expressions, the common excitements to quarrels, particularly guarded against by the military code, but acts or gestures, having a tendency even to provocation, are expressly and strictly forbidden; and either, if used or practised, are made liable to punishment, as it has been explained, by a singular and most summary process. There are also large and comprehensive Articles, in the same code, embracing every species of ungentlemanly and unbecoming conduct, as well as of more absolute offence, as affecting the quiet or tranquillity of the military state, that point out a direct and more solemn proceeding, by the ordinary course of courts martial, against the offenders under them *.

So that there is an easy and never-failing remedy, always within the reach of military men, for every personal injury, from the slightest insult, to the highest possible affront, to

* 28th Article of the sixteenth section, and the 2d of the twenty-fourth.

which they may be exposed. The only remaining ground, therefore, on which duel has been at any time seriously attempted to be defended, is taken from the members of the military community; leaving them consequently without the common apology of those who seek to excuse themselves in the recourse to the practice, in the want of other resource.

It has been lamented by the moralist, that the "insufficiency of the redress which the law of the land affords "for those injuries which chiefly affect a man in his sensibility and reputation, tempts many to redress themselves." This ought, says *Paley*, to be remedied: and in the benevolence of his nature he seeks to devise a remedy; and finds one, if not calculated for general application, peculiarly adapted, as he thinks, to the military profession; which he thus proceeds to describe.

"For the *army*, where the point of honour is cultivated "with exquisite attention and refinement, I would establish "a court of honour, with a power of awarding these submissions and acknowledgments, which is generally the "purpose of a challenge to obtain; and it might grow into "fashion, with persons of rank of all professions, to refer "their quarrels to the same tribunal."

It would have rejoiced this good and revered divine to have known, if his acquaintance with the practices of military life or of the laws that govern it, could be expected to have formed a part of his general knowledge, that not only the foundation for such a court had already been laid, and its superstructure had been in a great measure raised, at the time of his writing, but not yet wholly perfected; though the materials for the completion of the edifice, be prepared and ready for the hands of the builder; requiring only to be put together to fulfil the design of its great architect, in establishing a temple, that shall do honour to the present age and to futurity! It is of no slight reproach, that, with a

plan of so much utility and beauty, and with materials of such abundance, it still remains unfinished.

It has been observed, in an earlier place, that very great pains have been exhibited to establish an ample jurisdiction in the military state over every personal wrong that can threaten its members, with power of awarding the requisite satisfaction and amends, so that it would be superfluous again to particularize them.

But though it has been shewn, that remedies are not wanting for those injuries that may touch the soldier in his honour or reputation; and that peculiar courts exist, through which they may be at all times obtained; it is to be confessed, from some cause or other not capable of a satisfactory explanation, that they are sometimes abandoned in the military law, and in defiance of its tribunals, for private and personal means of redress; the manners of the army having gotten, much to the discredit of the latter, the temporary ascendancy of the law. It is the duty, however, of every well-regulated mind in the profession to help the law to regain its superiority, by combating and resisting the usurpation. It will require no other effort, than to study the Articles of War with sufficient attention, and to draw forth the energetic means which they hold out for their proper vindication.

It has been erroneously and strangely supposed, and by some from whom more correct notions might have been expected, that military officers, though liable to be cashiered for sending a challenge, are nevertheless exposed, in the event of bearing with opprobious words or acts of insult, to be dismissed, on that account, by a court martial, or compelled, by the private judgment of their associated brethren, to resign their commission in his Majesty's service. This is to suppose, that the law military is so unreasonable, that those, unhappily living under it, are equally subject to its vengeance, whether they comply with or offend against its

letter. Is there any occasion to vindicate this or any other law, designed for the government of rational beings, from so monstrous an imputation?

The supposition just noticed, assumes that there is no alternative in an insult received, but in challenging the offender, which may induce cashiering, or submission to the offence, which may entail dismission, or compulsory resignation; overlooking, altogether, the provision of the law in framing a variety of remedies against provocations, and acts of higher aggravation, if they are the objects of pursuit, through the intervention of suitable courts.

In common justice to the law military, it is to be remarked, that at the time it punishes those who seek satisfaction on any supposed injury by their own hands, it does not shut them out from the pursuit of redress by the lawful means which it had previously pointed out. It is rather for the neglect of the latter means, that such its punishment is principally awarded. There is a well-known and recommended medium between the personal resentment of a supposed insult, and an unqualified submission to it. There is a legal remedy, if the party imagining himself wronged chooses to follow it. If he venture not an appeal to his commanding officer, or a higher tribunal, which is open to him, but submits to opprobium or disgrace without any attempt to throw it off, he may reasonably be supposed to admit the truth or justice of the reproach cast upon him; and will have no one but himself to blame for the consequence which may flow from a suspicious patience under the affront. If under these circumstances he should be dismissed from or be obliged to resign a profession which cannot suffer the semblance of dishonour; the act will be his own, in not having courage or confidence enough in his cause, to make the necessary appeal, and not the irrationality or the defect of the law. The

latter must not therefore be impeached for faults which belong not to itself, but to others.

It is the object of the law military to have all disputes of the military community, and all matters that may induce them, referred either to the private arbitration of the presiding local authority, or the decision of a general court martial; and to this end it forbids the adjustment of them by the hands of individuals; making an attempt thereat the most serious offence, short of a capital crime. It subjects the challenger, without mitigation, to the penalty of cashiering, whatever may be the acerbity of the injury received; or whatever the conduct of the person provoking it; and in order that the offence may not escape detection or punishment, it exonerates the party receiving the challenge, from every imputation of pusillanimity in the non-acceptance of it, and declares him, in such his refusal, to have acted in strict conformity to his duty, and in obedience to the commands of his great military chief. It also exposes him who shall presume to upbraid any officer or soldier for refusing a challenge to the same punishment with the challenger. And yet it has been crudely conceived, that the non-acceptance of a challenge by an officer would infer, as in the other case just noticed, an absence of courage; notwithstanding the direct legal declaration, and the highest military authority, to the contrary; and the legal punishment awardable to those who shall dare to suggest the imputation: as if the care and precaution of the law were intended as a mere mockery!

A whole current of decisions by courts martial happily shew, that the provisions of the law were never meant to remain a lifeless letter. There are instances, without number, on record, too numerous indeed to admit a specification, of charges preferred against the givers and promoters of

challenges, at the instance of those receiving them; and on which the parties have been convicted and cashiered, while the prosecutors have retained their stations, and an unblemished character in the army. It would be a strange perversion of the courage of a soldier to have it supposed, that though dedicated to the service of his country, it should still be at the call of every idle brawler! What liberal mind could submit to so wretched a thraldom as to have no choice of action but to be governed by the humour, rational or irrational, not of a superior, but an equal? Could genuine courage be imagined to exist under so slavish a dispensation? Giving the utmost credit to such a sort of courage, and what merit is attached to it, governed as it must be, by no alternative or choice of its own? On the other hand, as every refusal of a challenger must more or less involve the reputation of the party refusing it, as the provocation to the challenge must be understood to arise out of his conduct, it must in general be presumed no slight test of conscious rectitude, as well as courage, that he submits his conduct to be solemnly canvassed by those who can judge with deliberate and due consideration, what duty and honour dictated in the particular case, and whether they have been regarded or not. This may be deemed the true criterion of courage, infinitely more consistent and convincing than the bare acceptance of a defiance, under whatever circumstances it may be thrown out. And it is fortunate, that it is becoming, from the force of commanding examples, a favoured, and it is to be hoped that it will be in time a common test. This it is that marks the distinction between a liberal and rational principle of action, and a mere mechanical impulse.

If it be a matter of regret that in a large communion there may be some rash, violent, and unreflecting men, carried away by a servile obedience to ill-conceived and ill-considered prejudices, who, yet unable to burst the chain of so unworthy

a slavery, may hold that the military character for courage can only be sustained by the maintenance of an absurd and a brutal practice; it is consolatory to know, that there is to be found in the same body of men, characters of a more generous, noble, and magnanimous bearing, who dare to think and act by the light of their own reason, and the internal impression of what is right; in contempt of the trammels of an ignorant and barbarous prescription, that would deprive them of the exercise of those diviner faculties constituting the enviable difference between man and the animal of the pasture. Every instance of this self-respecting courage, as it can be evinced only by one of so confirmed and established a reputation as to be superior to the fear of vulgar animadversion, must have an influence on public conduct and morals to outweigh a hundred instances of a contrary complexion.

Some striking examples of this species of courage have received, with the reverence of the army at large, the particular approbation of its august and venerable head, and in so pointed and public a manner, as to leave not a doubt that the exertion of this manly virtue is peculiarly grateful to the feelings of his Majesty, as conducive to the general good, and the advantage of a service deservedly dear to his heart. One precedent, among many, I may perhaps be excused in noticing, as it lays down a rule of so general an extension, as to be capable of application, to a vast variety of cases, which it is easy to foresee may fall almost daily within the scope of its principle. The example alluded to relates to the refusal of the challenge of the late *Major Armstrong*, by *Major-General Sir Eyre Coote*.

As it would be hardly practicable to give a more brief and satisfactory account of this transaction, or of the grounds out of which it originated, than is afforded in the public letters, which were commanded by his Majesty to be addressed

to the major-general, and to the army on this occasion. They may be inserted without any apology, in their own striking language.

Horse Guards, 28th June, 1800.

SIR,

I have the honour herewith to transmit to you a copy of a letter addressed, in pursuance of his Majesty's commands, to *Major-General Coote;* and at the same to signify to you, that it is his Royal Highness the commander-in-chief's pleasure, that you cause the same to be read, the first opportunity, at the head of the regiment under your command, and afterwards to be inserted in your regimental orderly book, to the end that every officer may be fully apprised of his Majesty's sentiment upon the subject to which this letter alludes, and particularly that officers, who are intrusted with commands, may be made sensible, that it is incumbent on them, on no account, to permit any misunderstanding, which originates in point of duty, to become a matter of personal dispute.

The commander-in-chief is persuaded, that the royal approbation, which has been so fully expressed to *Major-General Coote*, will ensure the same line of conduct under similar circumstances from every officer who entertains a just sense of the duty he owes to himself and to society, and is actuated by an earnest zeal for the good of his Majesty's service, which is best exemplified by a strict observance of discipline, and a due submission, on every occasion, to the laws and government of his country.

I have, &c.

(Signed) H. CALVERT, A. G.

To

the Officer commanding

the Regt. of

Horse Guards, 25th June, 1800.

SIR,

I have received his Royal Highness the commander-in-chief's directions to signify to you his Majesty's most gracious approbation of your conduct, in respect to *Mr. Armstrong*, late major in the 11th regiment of foot.

His Majesty considers the conduct of *Mr. Armstrong*, in having endeavoured to ground a personal quarrel, on the evidence, which you gave in conformity to your duty on your oath before a general court martial, as militating not less against the principle of public justice, than against the discipline of the army; and his Majesty has been pleased to direct, that it should be signified to you, in the strongest terms, that by having had recourse to the laws of the country on this occasion, you have displayed a spirit truly commendable as a soldier, and peculiarly becoming the station you hold in his Majesty's service, to which you have rendered a material benefit, by furnishing an example, which his Majesty has ordered to be pointed out, as worthy the imitation of every officer under similar circumstances.

In order that his Majesty's sentiments on this head may be generally known, I have received his Royal Highness's commands to transmit a copy of this letter circular to commanding officers, with directions to cause it to be inserted in the books of orders of their respective regiments.

I have, &c.

(Signed) H. CALVERT, A. G.

To

Major-General Coote,
&c. &c. &c.

The principle laid down in the foregoing documents is not limited to the particular case of *Sir E. Coote;* but applies to the whole round of duties which any officer may be called upon to fulfil, and which he is charged not to make the subject of personal dispute; and generally reminded, "that a zeal for his Majesty's service will be best exemplified by a strict observance of discipline, and a due submission, on *every occasion,* to the laws and government of the country." It would be hard to find either a cause for challenge, or for the acceptance of it, which would consist with the broad principle of duty herein asserted.

These letters contain the most instructive gloss that could be put on the last Article of the present section, demonstrating that the non-acceptance of a challenge may, under certain circumstances, be not a matter of mere negative excuse, but of absolute and positive commendation. Whilst on the other hand it is not, at any time, to be received, without a direct breach of discipline, and a violation of civil as well as military law.

It may be inferred, from what has been noticed, that so far from soldiers being particularly obliged, by professional considerations, to resent personal affronts; they are of all men least called upon to redress such injuries of themselves, as the most minute caution is exhibited on all hands, to prevent provocations of that nature, to demand amends or satisfaction for them if they shall be offered, and inasmuch as challenges (a remedy being otherwise provided) are strictly forbidden in all cases under the gravest punishment; and the refusal of them is not only declared to be a matter of duty, but in some instances a circumstance of high desert; and as every species of reproach of the giddy and unthinking (from others it could not be anticipated) is removed from the act, and visited, if unwarrantably used, with a most severe but just penalty. If, therefore, the military com-

munity shall be found to neglect the remedy, provided for them by military law, and peculiarly sanctioned by military usage (a remedy unfortunately wanting to the general bulk of mankind); and shall presume, without the pretence of necessity, to frame a means of redress, of their own advice and of their own authority, they would appear to be less excusable than any others, and to claim the least indulgence of the law, which, however, it may allow for human infirmity in a difficult and trying situation, will not stoop to find an excuse for rash prejudice, perverse violence, or inveterate humour. When the dictates of the latter are consulted, and preferred to the plain and reasonable doctrines of the law, it would be most unbecoming and unpardonable in courts constituted under the law to strain their ingenuity, to frame palliations and excuses for acts, which they are obliged, in the common understanding of their oaths, and the common dictates of their conscience, to impugn and to condemn.

Courts martial are bound to give the quality to acts, committed under certain defined circumstances, which the law attaches to them; and are not at liberty to construe them by their own feelings, or the prejudices of others, though haply they may have precedents to bear them out, but to weigh them in their sound and rational judgments, instructed and enlightened by the law, and governed by their oaths. The members of such courts are not desired to deviate into any new course, but to regulate themselves in this, as they are wont to do in all other cases, and to pronounce the law fearlessly on the facts produced to them in evidence, without any deference or delicacy to the crime, which seems not entitled to any distinctive lenity, or favour to the criminal; leaving the legal consequences to those whom they more immediately concern.

I shall not, I hope, be understood, for it is the furthest

from my intention, to be arguing for the exclusion of mercy, when it may on rational principles be recommended or interposed, from the unhappy cases of duel; for miserable would be the administration of justice, where such an exclusion could be endured. I am endeavouring only to limit its operations to its prescribed and proper sphere, where it may be exercised on fitting occasions, with the grace and dignity which alone can render it respected, on a mature, deliberate, and dispassionate consideration of the circumstances of the intervenient case by a known, permanent, and revered organ of the constitution; instead of suffering it to depend, in an assumed authority of the attribute of Majesty, on the capricious sentiment of individuals, fluctuative in opinion, as well as in office; from whom no general conformity in judgment could ever be expected, nor any continuity in responsibility, so as to ensure a judicious use of a most delicate power, to the relaxation of the severity of legislative regulations, without which criminal justice might wear a countenance of forbidding frowns, and never varying terrors.

The functions of courts martial are large and important enough, though they include not the prerogative of mercy; since they have patiently to investigate in every instance the whole body of facts from which legal guilt is to be deduced or repelled; to weigh opposite and conflictive evidence, as it may serve either to make out or refute the alleged crime; and finally to apply the law to the facts as they may be established in evidence. As this office shall be duly discharged, it will redound to the credit of those who have to fill it; and more especially in a case, where a liberal exertion will be previously required to obtain a victory over rooted, but ill-founded prejudices. But the conquest, if difficult in attainment, will be most admirable in its consequences, since it cannot fail to abolish in the end a senseless

and a horrid practice; not less reproachful to the military character, than shocking to humanity itself. It will introduce, in its stead, an appeal conformable to reason, and congenial with law, which I have humbly endeavoured, and I trust not altogether vainly, to recommend, in enforcement of the policy and humanity of the military ordinances; which if not contumeliously set at defiance, have been long and fatally neglected. In rendering the recourse, in controversies affecting reputation and character, to a lawfully constituted forum, common and fashionable, to which military men, from the acknowledged nicety and general impression of their honour, may safely carry their disputes, without any imputation of their courage, a desirable advantage may be effected to his Majesty's service, and a yet more beneficial, because a wider effect, may be operated, by the example, to society at large; who, seeing that a competent court may be formed for the decision of personal differences, and that men of unimpeachable reputation submit cheerfully to its jurisdiction, may naturally betake themselves in *similar* cases, to a *similar* course of adjudication, if it be not practicable for them to benefit themselves, as some have anticipated, of the proceedings of the same tribunal. Such an event would be the means of doing away certain jealousies, connecting themselves with the supposed peculiar habits and sentiments of those devoted to the military life, which, under particular impressions, have kept the military and civil classes more asunder, than for their common interests it could have been wished; and superinduce an universal and unreserved intercourse between the citizen and the soldier, with a reciprocal respect for one another, to the mutual advantage of both.

SECTION THE EIGHTH.

Sutling.

As a soldier, in certain situations, is not at liberty to quit his station, for the purpose even of supplying himself with the necessaries and conveniencies of life, it is peculiarly incumbent on those set over him to furnish the means of supply, which he may be precluded from providing for himself, sufficient in their quantity, of a fit and proper quality, and at a reasonable rate. This is effected sometimes, in a limited extent, by public commissaries, or by individual contractors, but more generally, through the agency of licensed individuals, under the denomination of sutlers; who are permitted, under defined conditions, to bring victuals and liquors into the camp, fort, garrison, or barracks, as the case may be, to be retailed out by them to the soldiery at easy and moderate prices. The retailing of these Articles in the manner described, is well known and understood, under the term of *sutling*.

Sutlers, being *permitted* sojourners, as well as *licensed* dealers, within the camp or other military station, to which they may happen to be attached, are obliged to conform, in all matters of police, to the general rules that are made for the observance of the military community; as also to the terms and conditions of the licence granted to them.

The regulations, under this section, define with conciseness the general duties of sutlers, with the relative duties of officers and soldiers with respect to them, with as much clearness as is supposed to be necessary for the elucidation of what is required of them in their relative situations; leaving many particular obligations to rest on the usages and customs of war, which must be understood to be known.

ARTICLE 1st.—This Article, in order to promote sobriety, to prevent nocturnal disturbances, and the abbreviation of the necessary hours of refreshment and sleep, and to secure the fresh return of soldiers to the daily calls of the service, regulates—" That the houses and shops of sutlers shall be closed at nine o'clock at night, and not opened, for the entertainment of soldiers, before the beating of the reveilles in the morning, and within the inclusive times, that no sutler shall be permitted to sell any kind of liquors or victuals, under the penalty of his being dismissed from all future sutling." The like penalty is awarded against those who shall profane the sabbath, by the sale of liquors or victuals during the time of divine service or sermon, on Sundays; and for the same reason, it may be presumed, on other appointed holidays or days of public thanksgiving or humiliation.

ARTICLE 2d.—Liberty is granted by this Article to officers, non-commissioned officers, soldiers, and sutlers, to bring any quantity or species of provisions, *eatable* or *drinkable*, into any of his Majesty's forts or garrisons; with the single exception, that the same interfere not with any subsisting contract or contracts entered into by the Crown or by its order, for furnishing the same species of provisions with those introduced.

All articles, therefore, of food or drink, respecting the supply of which no contract or contracts exist, may be freely brought by officers or soldiers, or sutlers within the walls of any fort or garrison. But such articles must be designed or destined (so far as regards officers or soldiers) for the private use or consumption of themselves or their families respectively, and not to be transferred, under colourable pretences to indifferent persons; for *that* would counteract the trade of the licensed dealers, and defeat the object of the licence, and would amount, in fact, to *sutling*;

an occupation, in which military persons are forbidden from engaging without especial licence from the governor or commanding officer of the garrison. Besides, liquors could not be sold, wholesale or retail, without an especial licence from the civil magistrates.

It has been, at all times, the peculiar policy of the military ordinances, from the opportunities that it would otherwise afford for abuse, to preclude any one, clothed with a military character, except in particular circumstances, from being employed in the purchase or sale of provisions, with the purpose of reselling or retailing them out afterwards to the soldiery *.

ARTICLE 3d.—By this Article, governors, and others, commanding in his Majesty's forts, barracks, or garrisons, are required, as they shall answer for their neglect, to see that sutlers supply the soldiers with good and wholesome provisions, and at the market price.

Such officers must be be necessarily taken to be vested with authority to effect the salutary intent of the Article, by making and enforcing regulations for the exclusion from the camp or garrison of any articles of unsound or unwholesome food, or of adulterated and pernicious liquors; as also for the punishment of the sutlers, by such authorized means as are in their hands, who may be found to offend therein.

The selling of *unwholesome* provisions has always been considered as an offence against the *public health*; and has on that account been punishable in a variety of ways, by the common law courts, according to the degree or repetition of the offence. By the 51st Henry III. sect. 6, the sale of corrupted wine, or of contagious and unwholesome flesh, &c. &c. is prohibited, under pain of amerciament for the

* "No officer or soldier shall be a victualler in the army, upon pain of "being punished at discretion." Article 45th of the Articles of *James* the *Second*.

first offence, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth.

By the custom of war, evidenced in the military ordinances at different times published, the same act has been regarded as a public offence, and punished accordingly. By the rules and ordinances of the *Earl* of *Northumberland*, temp. Car. 1, it is directed, "That no victualler shall presume to issue or sell unto any of the army unsound, unsavoury, or unwholesome victuals, upon pain of imprisonment, or other arbitrary punishment." The same offence is declared to be punishable by the statutes of war, published by the *Earl* of *Essex* about the same time, with *imprisonment*, *confiscation*, and *other* punishment.

The 44th Article of the Rules and Articles of *James* the *Second* is directed against the like offence, suggesting the mode of proceeding against the offender; and shewing the policy in which the Article is founded:—

"No commissary or victualler (says the Article) shall "bring or furnish into the camp, any unsound or unsavoury "victuals, of what kind soever, whereby *sickness* may *grow* "in the *army*, or the *service* be *hindered*; and if upon examination before the general court martial, he shall be "found guilty, he shall suffer such punishment as they "shall direct."

Though in the Mutiny Act or more modern Articles of War, there be no specific provisions or regulations touching the duty of sutlers, as such; there can be no doubt, that whenever and wherever they can be bonâ fide regarded as *camp-followers*, or constituent parts of a fort, garrison, or barracks, as they are commonly affirmed to be, they will be subject to be treated for the breach of any special duty imposed on them, or by the general police regulations of the camp or garrison, after the same manner, as the ordinary military members of such camp or garrison.

What has been said of *sutlers*, being integral parts of, and enjoying the local protection of the camp or garrison, would seem to apply to commissaries, contractors, or victuallers, under the same circumstances, but not otherwise; and more especially when on service, or in the execution of their respective duties in a foreign country. At home when the civil court is at hand, and holds a concurrent, if not a supreme jurisdiction over the offences of which these descriptions of persons may be guilty to the public detriment; it may be safer, and it is, indeed, the usual practice to proceed against them by indictment or otherwise, at the discretion of the officers of the Crown, or the will of the individual informant. But nevertheless the governor, or commanding officer of the fort, garrison, or barracks, being the chief civil, as well as military authority within the same, is competent, in all cases, by the interposition of the weight of his hand alone, to suppress or put down any rising flagrant offence, which, if suffered to be perfected, might injure the health of those placed under his command; by the obstruction of the sale of viands, or liquors that might prove prejudicial to the soldiery.

There is a second duty enjoined by this Article, not inferior to the first, namely, that the governor or commanding officer shall see that the provisions of the soldier shall be reasonable in their cost, as well as good in quality; *i. e.* that they shall be supplied by the sutler at the *market price*. This can only be effected by allowing a fair and free competition in the venders of articles of consumption within the military station; and by repressing any fraudulent ways or attempts that may be tried for enhancing the price of the articles brought into the market; the governor or commanding officer being, from the nature of his command, and from the custom of war, furnished with sufficient power for effecting both these purposes.

All practices having a tendency to raise the price of victuals in the market, to the prejudice of the consumer, or of the fair dealer in such articles or commodities, have ever been reckoned by the common law among public crimes; and have been particularly described by various statutes*, the punishment allotted them being fine and imprisonment. The same practices being equally against the policy of the law military, have been consequently guarded against, and even more strictly, by the military ordinances. So long ago as the reign of *Henry* the *Eighth*, we find an express provision, against such offences, of the following tenor:—

"That nae man of the hoste use *forestalling*†, or re-
"grating of any victual within the hoste, on pain of for-
"feiture of *all* his goods and chattelles, and his body to be
"imprisoned and further punished at the king's pleasure."

Officers in command of armies in the field, or of garrisons abroad, had antecedently, and have since pursued crimes of this nature to punishment, under the general usages and customs of war, without impeachment or question; and possibly, so far as it might regard sutlers, strictly considered, might order proceedings against them touching the like offences in the martial courts, within the body of the kingdom, though it has been a less questionable course to submit them, as in the cases last noticed, to the jurisdiction of the civil authorities. No injury could possibly occur from such a reference, since the officers in command have an undoubted

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* 5th and 6th of *Edward* the *Sixth*, c. 14.

† *Forestalling* is described by the 5th and 6th of *Edward* the *Sixth*, to be the buying or contracting for any merchandise, or victual, coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price when there.

Regrating is also described by the same statute to be "the buying of "corn or other dead victual in the market, and selling it again in the same "market, or within four miles of the place." For a further description of these offences, see *Blackstone*, vol. 4, p. 158.

summary authority to suspend or remove the sutlers so offending, or supposed to offend, from their occupation as sutlers; and perhaps this punishment, except in an aggravated case, might be deemed commensurate with the offence, and sufficient for securing the good in the contemplation of the Article.

ARTICLE 4th.—To ensure the supply of provisions and liquors to soldiers, free from all taxation, and from oppressions, acting indirectly in the way of taxation, from the influence of officers in command, this Article prohibits governors and officers, commanding any of his Majesty's garrisons, forts, or barracks, and from the general applicability of the principle, all others, it may be imagined, in the exercise of any species of military command, whether more extended or limited, from exacting, either of themselves, or by connivance at the like exactions in others, exorbitant prices for houses or *stalls let* out to *sutlers;* and from laying any duty or imposition of their own authority, and for their *private* advantage; or being interested in the *sale* of any *victuals, liquors,* or other necessaries of life, or *merchandises,* brought into the garrisons, &c. under their commands, for the use of the soldiers, under pain, in violation of the prohibition (and on conviction thereof by a court martial), of being *dismissed* his Majesty's service, and of suffering such additional penalties as they may be liable to by the law.

The *letting out* of *houses* to *sutlers* at an exorbitant price, or the *connivance* at the act in others, or the *laying* of any *duty* or *imposition* on victuals, &c. brought into garrison, for the private *advantage* of the governor or the commanding officer, are offences of so clear and definite a character, as not to demand any illustration. But the remaining offence—"the being *interested* in the *sale* of victuals or *merchandises,* &c." is not perhaps so perspicuous or so easily discernible, as the others immediately preceding. The *interest* here

intended, is not only a *direct* interest, such as a proprietorship, or *part*-proprietorship in the articles sold; but a collateral, indirect, and even a very remote interest in the objects of sale. It was so determined by a general court martial held at *Cawnpore*, in the *East Indies*, in the month of November, 1811, on the trial of *Lieutenant-Colonel H. G. Wade*, of his Majesty's 8th light dragoons, on the express charge,—" of having exacted and received, in direct breach " of the 4th Article of the eighth section of his Majesty's " Articles of War, from *Daniel Clarke*, licensed sutler in the " cantonments of *Cawnpore*, or from persons acting in trust " for him, two bribes, of one hundred rupees each, which " were paid to him sometime in January, February, or " March last, or thereabouts, in consideration of his *(Lieu- " tenant-Colonel Wade)* having allowed the said *Daniel " Clarke*, or persons acting in trust for him, to *sell* spi- " rituous liquors in the lines of the corps under his " command."

The court pronounced the accused guilty of the circumstances charged, and sentenced him to be cashiered*.

The interest of the *Lieutenant-Colonel* was in this instance so remote, and so trivial in itself, being in its utmost value short of twenty-five pounds, that it could not be supposed to operate in any oppressive degree on the sale of the liquors to the soldiery, as the sum exacted from the sutler for his liquors might be repaid to him, in the course of his dealings, by the imposition of so slight an addition on the articles retailed, as to be scarcely perceptible to the consumer. But the quantum or the relation of the interest is not so much an ingredient in the offence, as the having any interest at all

* The sentence, according to the modern acceptation of the term *cashiering*, would appear to have gone beyond the penalty attached to the offence under the letter of the Article, which authorizes *dismissal* only; a punishment inferior to that awarded by the court. The former marks a disqualification for future service, which is not included in the latter.

engaged; which may set the officer's private advantage at variance with his public duty. Besides the abuse might bear no manner of proportion to the cause in which it originated; for this must always depend on the spirit of the *protegé*, and not of the *patron*; the latter by his collusion, or his participation in the illicit act, having thereby delivered himself up to the power of the tempter, so hand and foot bound, as to be utterly unable to interpose any control even in the most outrageous impositions, which by the duty of his office he is expected to check. In this view the most trifling amount, capable of being traced to the pocket of him who takes it, may be an equal inducement to criminal connivance with the highest conceivable bribe, which is not to be weighed in the scale or estimation of the giver, or of any third party, but of the receiver alone; it is the wages of sin, and of his own choosing or settling.

ARTICLE 5th.—A connivance by any governor or commanding officer, as in the last case, at the sale, at exorbitant rates, of liquors or victuals, &c. to the soldiers under his command, is punishable by this Article on conviction by a general court martial, with *cashiering*, and such other penalty as the law may enjoin, and this whether the offender has or has not an interest direct or otherwise in the articles sold. *Lieutenant F. Steitz*, of the 1st battalion H. M. 60th regiment, was brought, in the year 1813, before a general court martial, at the *Cape of Good Hope*, to answer to the following, among other charges:—

"For conduct highly unbecoming the character of an "officer and gentleman, in having at different periods be-"tween the 8th January and 2d August, 1812, bought "quantities of spirits from farmers, and giving the same to "be sold to the *detachment* under his *command* at nearly "double the price paid for it by him, thereby deriving a con-"siderable profit to himself, in direct violation of his Ma-

" jesty's regulations, highly prejudicial to good order and " military discipline, and contrary to the Articles of War."

The court found the prisoner *guilty* of having purchased spirits, and having allowed them to be sold at nearly double the price paid for them, but negatived the fact of his having derived a profit by it, from the circumstance of want of evidence.—And afterwards adjudged him to be cashiered.

The exorbitancy of the rate at which the liquors were sold to the soldiery, was concluded here, from the price of the first or original purchase by *Lieutenant Steitz*; but in most cases, it will be to be deduced, from the comparative market price of the day, or some other general standard of that kind, and the actual price demanded of and paid by the soldiers.

The Articles immediately noticed are the only provisions, contained in this section, for the regulation of *sutling*, in the forts, garrisons, or barracks, within his Majesty's dominions, aided in some degree by the 51st clause of the Mutiny Act; affording a facility and convenience to sutlers, to furnish themselves at all times with *licences*, for the sale, within their houses or canteens, of ale, wine, spirits, and other liquors, grantable only in ordinary cases at *particular* seasons of the year; and dispensing with certain previous notices, certificates, and forms, demandable in other cases, and saving the sutlers harmless from the operation of any pre-existing act, requiring such previous notices, certificates, and forms, to be given, possessed, or pursued.

The early ordinances* of war were more extensive in number, and more comprehensive in detail, on the subject matters of regulation in this section, than the Articles under consideration. They referred for the most part to acquired or captured articles of provision for men and horses; and guarded, in a spirit of economy, against the prodigal use or

* War Statutes of *Henry* the *Fifth* and *Henry* the *Eighth*.

wilful waste of such articles, whereby the consumption of the necessaries of life might exceed the common means of supply, and the price of them become thereby unduly enhanced. But as prize or captured property of all kind is now subject to another and more general arrangement, better contrived and regulated, a necessity for ordinances of this sort no longer exists.

SECTION THE NINTH.

Quarters.

THE right of quartering troops on the subject has at all times been deemed of a delicate, as well as of a doubtful nature. It was particularly called in question, resisted, and at length denied in the time of *Charles* the *First*. The petition of right declares—" That the people of the land are " not by the laws to be burdened with the sojourning of " soldiers *against their wills.*"—And by a statute made in the 31st year of *Charles* the *Second*, the freedom of the subject from such a burden is recognised and reasserted, and his opposition to it, if attempted to be imposed, is declared to be legal, it being enacted by such statute, " That no offi-" cer, civil or military, nor other person whatsoever, should " from thenceforth presume to place, quarter, or billet any " soldier or soldiers upon any subject or inhabitant of this " realm, of any degree, quality, or profession whatsoever, " *without* his *consent*, and that it shall and may be lawful for " any subject, sojourner, or inhabitant, to refuse to quarter " any soldier or soldiers, notwithstanding any demand or

"warrant, or billeting whatsoever." This principle has been subsequently acknowledged by numberless recognitions of the legislature, and may be considered to be so settled, as to allow not of any future doubt.

But though the exemption of the subject, *generally*, from having soldiers quartered upon him against his will, be recognised in the statutory declarations, just noticed, yet it has been found necessary and expedient, for the convenient movement of the national troops from one part of the kingdom to another, as the public exigency may require, to make *particular* persons liable to the entertainment of such troops within their houses, in their march through, or temporary sojourning in any place, appointed or assigned for them by proper authority; but this under certain regulations and restrictions, calculated to ensure an equal distribution of the burden, and to prevent oppression, or any undue favour being shewn to individuals liable to bear it.

The liability is declared and governed in all things by the law; and as this law, from the mixed character of our government, cannot be framed without the assent of the three estates of which the popular representation forms a constituent and prominent part, the liability may be said to be virtually declared by the assent of the persons subject to it.

The persons appointed by the legislature to bear this necessary burden are chosen principally from a class of people who live peculiarly by the public, and who are occupied in the course of their daily business in the reception and entertainment of strangers, and being provided more than any other description of people with the means of entertaining numbers, are, therefore, likely to suffer less inconvenience than persons in ordinary situations; such as the keepers of inns, livery stables, alehouses, victualling-houses, and houses for the sale of wines and spirituous liquors by *retail*, whether British or foreign, to be drank in

their own houses, or places thereunto belonging, with certain exceptions, particularized in the 48th clause of the Mutiny Act.

The legislature, in imposing this duty on the different descriptions of persons enumerated, has taken especial care to describe the boundary of it; to make it as little onerous as may be, to relieve against excess, and to protect those who are obliged to fulfil it from impositions and injuries that might arise out of so peculiar a charge.

A variety of clauses* in the Mutiny Act describe and enforce the duty of magistrates and certain other civil officers, in billeting and quartering soldiers, in conjunction with the officers of his Majesty's army, on those who are bound to receive them; and detail the penalties to which magistrates and civil officers will be liable, on the breach of the whole or any part of such duty. Of these it may be necessary to take some incidental, though not any direct or immediate notice.

Such parts of the last-mentioned statute as apply to military officers, and may involve a military inquiry, are briefly embodied in several Articles of War, constituting the present section.

The object of the regulations, under this division, is to protect the subject, liable to afford quarters to the troops, from an abuse of the powers vested in the commanding officer of any military body, in respect to the quartering of soldiers, in the first instance; to prevent frauds on those who have to furnish them for a given period with the requisite necessaries; and to provide redress or remedy for any violences or extortions, committed or practised by soldiers, in their quarters, or in their dealings in markets or fairs in the vicinity of them. The general rules that regard the duties of the officer or soldier, while in quarters, and in his

* 48th, 53d, 54th, cum multis aliis.

military capacity purely, will be found in another place, and under an appropriate head.

ARTICLE 1st.—To prevent innkeepers or others being burdened with more than the quota of troops for whom they are bounden by law to provide; and to prohibit the exemption of individuals from a participation in the common burden of quartering the troops, whereby the pressure would consequently bear the heavier on others; it is prescribed by this Article :

First—That no officer or non-commissioned officer shall demand billets for quartering more than his *effective* men;

Secondly—That he shall not quarter any wives, children, men or maid servants, in the houses assigned for the quartering of officers or soldiers without the consent of the owners;

And *thirdly*—That he shall not take money for the freeing of landlords from the quartering of officers or soldiers.

And in breach of any one of the branches of these injunctions, he will, if an officer, as is declared by this Article, be subject to be cashiered; or if a non-commissioned officer, to be reduced to a private sentinel, and to suffer such corporal punishment as by the sentence of a general or regimental court martial shall be awarded.

The offences just described are of a distinct character, but, if we may judge from the circumstance of the same punishment being indiscriminately assigned to them all, they are regarded, in respect to one another, as of equal criminality.

It is noticeable, however, that although the three distinct offences are viewed by the Article in the same degree of guilt; one of them is not at all described by the Mutiny Act, but is solely created and declared by his Majesty in the exercise of the general authority vested in him, to make Articles of War, for the government of his forces, and evi-

dently dictated with a view to check any motion towards abuses which were intended to be restrained by the legislature.

The part of the 48th clause of the Mutiny Act, inasmuch as it applies to magistrates, constables, and others authorized to grant billets for the quartering of soldiers, is sufficiently directory and mandatory in all things that concern such officers in the discharge of their duty under the Act; and in application to them it commands, that no more billets shall at any time be ordered than there are effective soldiers present to be quartered. But in respect to military officers, or the duties to be discharged by them, in the demand or acceptance of billets, the Act appears to be silent; and begins only to operate on or attach to them, in a subsequent part of the clause, when it denounces a penalty against the actual *quartering* of soldiers contrary to the provision of the Act.

If the billeting of the troops, which may be considered as a JOINT act between the civil and military officer, had been suffered to remain on the footing of the Act, *i. e.* on the *single* responsibility of the former, a shifting of the blame, in any case of excessive billeting, might be easily practised by a connivance or collusion of the parties concerned, so as to remove it from the responsible to the irresponsible agent. Hence it would seem that the Crown had been counselled, if not with the design alone of counteracting possible abuses, certainly with a view of giving greater security to the subject, to involve, through the medium of this Article of War, all officers military as well as civil, in the responsibility of the act. But to notice, in their order, the specific offences within the view of the Article.

I. As to the demand of billets for more than the effective men present,

It is to be remarked that the offence is in the *excess* of the

demand, and that it will be complete, whether the demand be complied with or not.

Who are to be deemed *effective* men, and as such, to be provided with quarters, may be learned from the Mutiny Act *; which describes them to be, " officers and soldiers " in his Majesty's service, and persons *receiving pay* in his " Majesty's *army*." In the latter description are included, surgeons, paymasters, and others who do not come precisely within the meaning of the term soldiers, though they receive military stipends.

II. As to quartering *wives, children,* and others, without the consent of the owners of houses assignable for quarters.

It must not be supposed, that because some persons are *named* who may not be quartered on innkeepers, &c. with impunity, that others, who are *not named*, may be so quartered. In the precedently described offence, it has been shewn, that the *demand* even of *quarters*, for more than the effective force present, is declared to be a serious offence, from which it must be inferred that the *actual* quartering them cannot be an innocent act.

It is also to be noticed that any quartering contrary to the intent and meaning of the Act is an offence which is liable, as it will be hereafter shewn, to a summary visitation.

For these reasons the rule of construction, that " expressio unius, est exclusio alterius," that the naming of one is the exclusion of another, would not seem to apply in this place.

The persons described in the Article have in all probability been named, on account of their very near relation to those entitled to quarters, and for the purpose of shewing the very rigid application of the Article to all, not absolutely efficient with the army; for in the express exclusion of such near relations to the soldier, from the benefit of quarters, it must

* 48th Clause.

be implied, that others more remotely allied are excluded also.

To guard the subject more effectually, constables, tithingmen, and other civil officers, on complaint and proof exhibited before a single justice of the peace, of an illegal quartering in this respect, are rendered liable to a pecuniary forfeiture, to be levied by distress.

III. Of *taking* money for the freeing of landlords from the quartering of officers or soldiers.

The offence described in this branch of the Article is the actual *taking* of money, for the purpose explained; and nothing less than the proof of an *absolute taking* would seem to satisfy the letter of the Article.

But the crime, as described in the Articles of War, falls very short of that intended to be described and defined by the legislature. The latter declares it criminal in any officer to *cause* any money to be taken, for excusing any landlord from quartering, as much so as if he had taken it with his own hand, on the common principle, it may be supposed, of "qui facit per alium, facit per se*." Nay, it carries the offence further, by rendering the officer equally culpable, and punishable, if he knowingly suffer money to be taken, by any other person. Such person of course must be supposed to be under the control of the military officer †.

The Mutiny Act is even more precise and strict, in the description of and the proceedings ordered against this offence, when committed by a civil officer; subjecting him to the penalties of the Act, not only if he *receives*, but if he *demand*, *contract*, or *agree* for, any sum or sums of money, or any reward *whatsoever*, for or on account of excusing, or in *order* to *excuse*, any person or persons from quartering, &c. &c. these penalties to be summarily enforced, on the

* By the 60th clause of the Mutiny Act.

† By the last-mentioned clause of the Mutiny Act.

oath of a single witness, and before a single justice of the peace *.

Though the Article of War does not declare the course by which the punishment applicable to the several crimes is to be awarded to commissioned officers, it must be presumed to be intended through the medium of a sentence of a general court martial. The Mutiny Act prescribes this method of proceeding in respect to one of the offences, and the others being found in close company with it may be assumed to be liable to the same prosecution. Besides it is ordered by the 20th Article of the 16th section, that no officers shall be cashiered or dismissed, except by the sentence of a court martial, or by a direct order from the Crown. And the offences here are set forth as matters of judicial cognizance.

There are two other distinct offences of which military officers may be guilty, having relation to the quartering of troops that are not at all described or referred to in any of the Articles under the present section; though they are specifically enumerated in the Mutiny Act, and may implicate such officers most seriously. One of these is of a general, the other of a particular description.

The *first* renders an officer liable to *cashiering*, "who shall "take upon him to quarter soldiers *otherwise* than is *limited* "and *allowed* by the Act;" *i. e.* in *private houses*, or in any other than those particularized by the Mutiny Act, or in greater *numbers* "than they ought to bear in proportion to "their neighbours." The construction is warranted by certain parts of the 48th clause, that describe the like offences, and the penalties attachable to them, when committed by civil officers.

The *second* subjects any military officer to the like punishment of being cashiered, who shall use or offer any menace or compulsion to or upon any mayors, constables, or other

* By the 61st clause of the Mutiny Act.

civil officers (such as tithingmen, headboroughs, justices of the peace, and other chief officers and magistrates of cities, towns, and villages), tending to deter and discourage any of them from performing any part of their duty required by the act.

The punishment in both instances may be after a very summary proceeding, viz. on a conviction before any two or more of the justices of the peace of the county by the oath of *two* credible witnesses. In which case, says the Act, any military officer shall be deemed and taken to be *ipso facto* cashiered, and shall be utterly disabled to have or hold any military employment in his Majesty's service; provided however that the *conviction* be *affirmed* at the next quarter sessions of the peace of the county, and a *certificate* thereof transmitted to the judge-advocate in London*; who is obliged to certify the same to the commander in chief and secretary at war. Or if the proper authorities be so minded, they may pursue both or either of these offences, being strictly military, through the ordinary medium of a court martial.

ARTICLE 2d.—As the quartering of troops on the description of persons named in the statute is the act of the legislature, the latter has used every precaution to make the burden imposed as light as possible, and to obviate the common causes of contention that might spring up, if not counteracted, between the soldiery and innkeepers, and others their appointed entertainers. To this end the Mutiny Act specifies with minuteness, what officers and soldiers are

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* In *Ireland* the conviction must be affirmed at the next assizes or quarter sessions of the peace, and a certificate thereof transmitted to the judge-advocate, who is directed to certify the same to the next court martial, by the 49th clause of the Mutiny Act. And in general, the provisions of the Act, in reference to the quartering of the troops in that part of the united kingdom, are, with a few modifications as to the official instruments to give them effect, the same as in *England*.

The quartering of the troops in *Scotland* is governed by the laws that were in force at the time of the Union.

to be furnished with, together with the rates or prices with which they shall be chargeable therefore—and when and how such rates and prices shall be paid. It also provides a civil remedy, at once prompt and efficacious, in favour of those who might otherwise suffer some inconvenience from the neglect of any commanding officer, to discharge the accounts owing by him, or those under his command in quarters, within the time prescribed by the act. The legislature seems to have had solely in its view the redress of the private injury which might accrue to the subject in the discharge of a duty created by its act.

In the Article now to be considered, his Majesty contemplating the *public* wrong which possibly might arise out of such private injury, has thought proper to hold the latter in the light of a crime, and in this place to declare it, and to annex a certain punishment thereto.

There is nothing either unreasonable or severe in this declaration, since it is always in the power of the commanding officer, through the authority vested in him by the Act, to adjust and satisfy the accounts of the innkeeper and others, under all and every circumstances; even in the event of his not having immediate funds applicable to the purpose*; the agent of the regiment being obliged to discharge and satisfy all accounts, when they shall be regularly certified by the commanding officer to be due for quarters, so that they be conformable to the letter of the Mutiny Act.

This Article renders it criminal in any commanding officer of a regiment, troop, company, or detachment, whether in settled quarters or upon a march, who shall fail to *clear* regularly his own quarters, or the quarters of any and every officer or soldier under his command, at the end of every four days, or before the troops shall quit their quarters, if they do not remain so long as five days. The punishment

* By the 67th clause of the Mutiny Act.

awardable to the crime is discretional, on a conviction thereof, before a general court martial.

"To *clear* quarters," is a term well understood in the army, intending the payment or satisfaction of the demands of those furnishing such *quarters*, and other incidents connected with them; such as the charge for diet and small beer; but then these demands are not to exceed the respective amounts authorized by the Mutiny Act; for otherwise it could not be criminal in the commanding officer, but on the contrary would be consistent with his duty, and no more than what he owes to his own interest, to resist them.

As on a charge, founded on this Article, it will be incumbent generally on the accused to shew a proper clearance of the demands for quarters, it may be advisable for commanding officers to obtain an acquittance, or voucher, from the demandant; or to have satisfactory evidence of the payment of the demand. The affirmative must almost always rest on the accused, it being impossible in the generality of cases for the prosecutor to prove a negative; other than by his own testimony, which in a criminal case will be enough to put the affirmative, or contrary proposition, on the shoulders of the accused.

ARTICLE 3d proceeds on the same preventive policy with the preceding Article, and originates from the same source.

This Article enjoins that the commanding officer of every regiment, troop, company, or detachment, shall cause public proclamation to be made, wheresoever the troops under his command are to remain in quarters, signifying, that if landlords or other inhabitants suffer the non-commissioned officers or soldiers to contract debts beyond what their daily subsistence will answer, such debts will not be discharged. And on a refusal or neglect of the commanding officer to issue a proclamation to this effect, he will be liable to be

suspended for the space of three months; and the whole of his pay, for such period, will be applicable to the discharge of the debts contracted by the non-commissioned officers or soldiers under his command, beyond the amount of their daily subsistence.

The proclamation, directed by this Article, is to be made, or is required only to be made, in such places where the troops are to *remain* in quarters, and not daily on the march.

The offence consists in the resistance or omission of a positive duty imposed by the supreme authority over the army, subjecting the party guilty of it, as has been shewn, to a definite and mixed punishment: *i. e.* suspension from his office for a given time, and the temporary forfeiture of his pay; and involving such consequences, must be taken on an ordinary principle of construction, though the Article is silent on the subject, to come within the cognizance of a general court martial.

On any other construction, it would be impossible to collect from the body of the Article, by what instruments its purposes are to be effected.

One part of the punishment, namely, the *suspension*, is peremptory in every case, and immitigable; but the other (the *forfeiture* of *pay*), on any favourable ground appearing to the court, and the circumstances of the case admitting it, may be to a certain extent moderated. The forfeiture is awarded on a calculate of the possible or probable debts that may be contracted by soldiers, through the neglect of the publication of the proclamation, or is intended principally to keep pace therewith; and it may therefore have been left to the breast of the court martial, if the amount of the forfeited pay shall be more than sufficient to satisfy the debts claimed on account of the soldiers, beyond the amount of their daily subsistence, to order the *overplus* to be returned to the suspended officer. This, however, is of indulgence;

and not of right; for the words of the Article are not that the overplus *shall* be, but that it *may* be returned. The forfeiture of pay is a necessary consequence of suspension; for pay is the wages of service: the party suspended cannot therefore be supposed to have any right, during the term of his suspension, whatever right might be thought to reside in others, to any portion of the stipend attached to the performance of an office, in the discharge of which he was temporarily restrained.

ARTICLE 4th.—This Article has more of a civil than a military aspect; being intended to serve as a caution to the inhabitants of places where soldiers are quartered, not to credit them after the public proclamation, directed by the preceding Article, shall have been made, beyond the amount of their daily subsistence money, or it will be at their own peril. It further states the illiability of commanding officers to pay the debts of soldiers after issuing the proclamation.

ARTICLE 5th.—As quarrels between the military and civil classes of the king's subjects, from the circumstance of their being so unequally armed, with relation to one another, might terminate often in much mischief; and as the one, by reason of their comparative weakness, might, if not externally guarded, invite or not be competent to resist the assault of the other, it is the obvious policy of this Article to protect the weak against the stronger, to the preservation of the public peace. With this view it is enjoined that every officer, commanding in quarters, garrisons, or on the march, shall keep good order, or redress to the utmost of his power all such abuses or disorders as may be committed by any officer or soldier under his command. A primary and positive duty is hereby laid on every commanding officer to maintain the tranquillity of the place, wherein he exercises his command, to the utmost of his ability. Yet as the ordinary vigilance of such officer might be eluded, or the pre-

ventive means, in his hands, might sometimes be insufficient to keep the peace inviolate, a secondary or further obligation is imposed on him by the Article, to bring the violators of it, when they shall be discovered and *pointed out* to him, to public justice; that the guilty may not escape, and impunity be thereby held out to the bold and daring offender.

The second branch of this Article makes it criminal in a commanding officer, and places him in a like situation with the principal in the offence; *i. e.* subject to such discretional punishment as a general court martial may award, if he refuse or omit to see justice done on the offender or offenders, and reparation made to the party injured, on a complaint made to him for that purpose, of any officer, non-commissioned officer, or soldier, under his command, "having "beaten or otherwise ill-treated his landlord, or extorted "from him more than he is obliged to furnish by law;" or "having disturbed fairs or markets; or committed any kinds "of riots, to the disquieting of the people."

The offence is more clearly pointed out in this Article, than the mode by which it may be avoided. A commanding officer would certainly have been more secure, if it had been shewn by what means "he is to see justice done," or "reparation made," in the several cases, set forth in the Article, for the refusal or neglect of which he is declared to be punishable.

It does not appear from the Mutiny Act, or from any thing expressed in the Articles of War, that he has any power vested in him, to do summary justice to the parties that might complain to him; or the means even of ascertaining the truth or falsehood of their complaints. And I am not aware that there is any thing in the nature of his office, or the quality of his command, that arms such commanding officer with the authority requisite for carrying the purposes

of the Article into effect, of himself, or in any other way than through the intervention of some other organ. Nor would it seem, from the wording of the Article, that the commanding officer is contemplated in the light of an *executive* officer. He is not to *cause* justice to be executed; but *to see* that it is done; so far only, of course, as is within his ability to do. If this be so, the next question is, what is he competent and bounden to do, to satisfy the duty prescribed by the Article? And some fresh inconveniences present themselves, in limine, from the supposed imperfect powers of the appointed agent to execute what is required of him.

The commanding officer has no authority, it is apprehended, to receive a complaint on oath, or to proceed to inquire into the merits of it by the testimony of witnesses, in order to decide thereon. And in no matter, however trivial, in which the rights or interests of the soldier may be concerned, can any judgment be pronounced, but on evidence to be taken on oath. So that such officer, in the very first instance, must consult other means, than he has within himself, for *seeing* that justice may be done on any complaint preferred to him. Where are those means to be found? It may be supposed either in civil or martial courts. They cannot be expected to be furnished from the former; for the commanding officer is clearly not the agent through whom any civil redress can be prosecuted or aided. This in general must be sought through the civil magistrate. If it had been intended that the redress should flow from a civil jurisdiction; a civil, not a military instrument, would have been employed to minister it.

If the justice directed by the Article to be done is to be effected, as it may be conceived, through the medium of a military court, the course of accomplishing it is not without its difficulties, both in respect to some of the parties con-

cerned in the complaint, and the nature of the remedy ordered by the Article.

In complaints that might be exhibited against a *commissioned officer*, to whom, as well as non-commissioned officers and privates, the Article applies, the commanding officer has no authority further than to entertain the complaint, when formally preferred, and forward it to head-quarters; except indeed, he should think fit, if the occasion should demand such a procedure, to place the accused party under arrest. All his official authority would be exhausted by the completion of these acts, and the proceedings beyond them must depend on others.

Over complaints against non-commissioned officers and privates, his dominion would seem to be more full, but yet imperfect. He may sustain, it is true, the charges exhibited to him, he may imprison the accused, he may appoint and assemble a court to inquire into and decide on the subjects of complaint, and, with certain exceptions, as affecting warrant, and some non-commissioned officers, may order, *of himself*, the judgment of the court, to be executed or moderated according to his discretion. But he cannot take upon himself to determine, originally, the truth or falsehood of the complaint, or to aggravate or to add to the sentence. Much less can he exercise, from the functions of his office, any civil control over the property or pay of the soldier, so as to order, of his own act, any pecuniary reparation to be made to the complainant, in the cases where it may be considered necessary. This reparation, like the punishment awardable to the criminal act of the party, must be apportioned and assigned by the court, wherever it has jurisdiction over the matter; and not by the commanding officer, who, by the Article, is directed only to take care, in the reparation which may be ordered to be made, that it does not exceed the half of the offender's pay. It cannot be very often, that

any part of a soldier's pay is available to the end proposed; since it is applicable in the first place to the discharge or clearance of quarters.

The principal effect of this Article, is, to control the general discretion of a commanding officer to entertain or not, as he may deem fit, the complaints of individuals not of the military class; obliging him to receive and speed them, in the cases specified, and in as much as in him lies, to a judicial determination and execution. In other than the instances particularized, he is left to act as before, on his best judgment, and on his own responsibility.

A short account of the mode of quartering the troops at the present day, with some particulars collaterally related with the act, may not be considered out of place; though they could not be exactly arranged under one or other of the Articles contained in the present Section.

When a regiment is to be removed from one station to another, an order for that purpose is issued by his Majesty, through his secretary at war, or his deputy, the commander-in-chief, the master-general, or lieutenant-general of the ordnance, which is directed in course to the commandant of the regiment, stating his Majesty's commands, that the regiment shall march from its existing quarters to some other place or places named. If the regiment be in *Ireland*, the order is signed by a person, especially appointed by the lord-lieutenant, for that purpose*. The order, so issued, is called a *route*, which sometimes particularizes the numbers of the divisions in which the regiment is to march, the places at which they are to halt, and the dates at which the troops will arrive at the appointed places. At other times, and most usually, the *route* is general; leaving it to the discretion of the commanding officer to move the corps by such divisions and stages, and at such times, as he may judge most

* 52d clause Mutiny Act.

convenient. The *route*, among other things, contains an order to all civil magistrates to provide the necessary quarters for the regiment, as by the Act is directed.

When a route is received by a commanding officer, he orders one or more copies to be made of it, which he attests and forwards by the quarter-master, or some other commissioned or non-commissioned officer, generally on the day preceding the march, to the place at which he purposes to halt, to provide the requisite quarters. On the arrival of such officer at the place described, he produces an attested copy of the *route* to the chief magistrate or other civil officer mentioned in the Act, as the case may require, and demands *billets*, or orders for quartering the number of the effective men in the town, village, or district, appointed to receive them. The billets are thereupon made out and supplied by the constable, or some correspondent civil officer, to the hand of the commanding officer of the regiment, or of the senior officer present on the parade where the troops are drawn up on entering the place.

The *billets* express the number of the troops, and the places whereat they are to be quartered.

The innkeepers, and others liable to quarter officers and soldiers, are bound to grant the quarters assigned to them by the billets, but are not absolutely obliged to supply them with provisions or diet, for a further time than whilst they are on their immediate march, including, it would seem, the halting days, when necessary or directed; except in the case of officers and soldiers employed on the recruiting service, and of recruits by them raised; in both of which circumstances they are compellable to entertain them; in the first case, whilst actually on their march, and in the latter, for the space of seven days, but not further*.

In all other cases it is at the option of the innkeeper,

* 65th clause Mutiny Act.

stable-keeper, and others, to supply soldiers with diet and small beer; or gratuitously to furnish them, if the innkeeper or other so elect, with candles, vinegar, salt, and small beer or cyder*, and further to allow them the use of fire, and the necessary utensils for dressing and eating their meat. In the latter alternative, innkeepers and others must give notice to the commanding officer of their election, to furnish the latter articles gratuitously, in the stead of diet and beer. This notice is intended for the information of the commanding officer, who in that event is to issue the pay and subsistence of non-commissioned officers and soldiers directly to themselves, to enable them to provide their own victuals and beer; and not reserve it, as he is otherwise authorized and directed, for the clearance of quarters†.

Where innkeepers and others choose or are obliged to supply diet, they were for some time to furnish it at the following rates, viz. for a commissioned officer of horse, being under the degree of captain, *two* shillings per *diem*; for the like officer of dragoons, under the degree of captain, *one* shilling per diem; and the same for a commissioned officer of foot, being under the like degree; for one light horseman's or dragoon's diet and small beer respectively, *seven pence*, and for one foot soldier *five* pence per *diem*; and for each horse for hay and straw, *six* pence per diem, and no more.

The rates, just mentioned, having been found to be inadequate to the supply of the articles required, an Act was passed in 1793, at the instance of the publicans, and for the relief of them and others obliged to find quarters, ordering a further allowance of *four pence* per diem for each man attached to the cavalry, and of *six pence* for every man belong-

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* The quantity of small beer or cyder required to be furnished to the soldier is five pints daily.

† 65th Clause of the Mutiny Act.

ing to the infantry, for diet and beer; making in the aggregate for each man, with the former allowance, *ten pence* per day.

By the last-mentioned Act, publicans and others are entitled to four pence halfpenny per diem, in addition to the former allowance for the subsistence of every horse quartered upon them, making in all ten pence halfpenny. The additional sums are not chargeable to the soldiers, but provided for under the head of extraordinaries in the army estimates.

According to the increase of the prices of provisions and other articles of general consumption, since the last-mentioned date, alterations have been made by parliament in the rates to be allowed to innkeepers and others for the diet of soldiers, so as to render them more adequate to the purchase of the articles of food, &c., to be supplied to the troops, and more particularly in the years 1810 and 1813*. Certain regulations were at the same time introduced, as to the quantities of the diet and beer, to be furnished at the specified rates, subject to the modification of his Majesty, from time to time.

In a regulation laid down by his Majesty, founded on the 50th *George* the *Third*, it is ordered that innkeepers shall only be liable to furnish each non-commissioned officer, private man, &c., with one hot meal (if required) in each day, which shall consist of one pound and a quarter of meat, previously to being dressed; one pound of bread; one pound of potatoes, or an equivalent of other vegetables; and two pints of small beer; with the necessary quantities of pepper, salt, and vinegar †; for which meal the Act allows to the innkeeper *eight pence*. This amount was afterwards in

* By the 50th and 53d *George* the *Third*.

† See General Regulations, p. 158.

creased, by the 53d of *George* the *Third*, c. 43, to one shilling and two pence per diem*.

Where the publican does not find diet, he is allowed by the Act last referred to, *two* pence per diem for each soldier, for supplying him with beer or cyder, which amount, like the last, is especially provided for in the extraordinaries of the army.

Innkeepers are not protected solely by the 2d and 3d Articles of the present Section, in their demands for the payment of the parliamentary rates, which are directed to be discharged by or on account of soldiers; but are further aided, by a summary and *ex-parte* remedy sanctioned by the 66th clause of the Mutiny Act. This authorizes the secretary of war in *England*, and the chief secretary, or in his absence the under secretary, in *Ireland*, to give orders to the agents of the troop or company, to pay and satisfy the amount of any sum that may be found to be due for the diet of soldiers attached thereto, to the innkeeper or the keeper of any other house, liable to quarter troops, which may have been neglected to be satisfied, at the time, or in the manner directed by the Act, by any officer, to whom it belongs to receive, or that actually does receive, the pay and subsistence money of such troop or company, so that such sum exceed not the rates allowed by the Act; on a certificate forwarded to the secretary of war, or chief secretary, as the case may be, from the justices of the peace of the next quarter sessions of the county or the city where the quarters were, of such sum being due, on account of diet, and of the person to whom the same is owing, founded on the previous oaths of two credible witnesses sworn before the justices, granting the certificate.

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* For further particulars respecting this arrangement, as it refers to commanding officers, and the mode of making up the difference between the soldier's pay, as referable to diet, and the sum allowed to innkeepers see the General Regulations, pages 159 and 160.

Publicans are not obliged by the Act to provide diet for officers of the degree of captain or of a superior rank, it being presumed, whether rightfully or not I shall not stop to inquire, that such officers are able to pay, out of their established allowances or stipends, such reasonable prices for the necessary articles of provision, as are claimable by innkeepers from their ordinary guests.

Victuallers or others, liable to have officers or soldiers billeted upon them, who shall refuse to receive or victual them, or to furnish or allow, according to the direction of the Act, the articles or things thereby directed; or shall refuse to furnish fit and proper stalls, with good and sufficient hay and straw for each horse, at the rate specified in the Act, and shall be thereof convicted, before one or more justices of the peace of the county, city, or liberty, within which the offence is committed, either on his own confession, or oath of one or more credible witnesses, such persons, so offending, are liable for every such offence to the penalty of five pounds, or any sum not *exceeding* five pounds, nor *less* than forty shillings, to be levied by distress and sale of the offender's goods; which sum, when levied, is applicable in the first place, for making satisfaction to any soldier for the expense he may have been put to, by reason of his not being quartered or furnished with the necessaries ordered by the Act, as such justice or justices may direct; the residue to be paid to the overseers of the poor of the parish, if in *England*, and to the churchwardens if in *Ireland*.

There is a like punishment awardable against constables, and in the same summary way, and liable to the same distribution, who shall refuse to quarter or billet officers or soldiers, entitled thereto, or who shall take any money to excuse persons from quartering them *.

Although innkeepers are not constrained to supply officers

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* See the 61st clause of the Mutiny Act.

of the rank of captain or of a superior degree, with diet, at the rates directed by the Act, they are nevertheless obliged to furnish them gratuitously, in common with subordinate officers, and other parts of the efficient force to be provided for, according to the regulations of the Act, with suitable quarters.

I have felt it necessary to notice this from some doubts, but I know not on what ground, being entertained on the subject. What should be the quality of such quarters is not specified in the Act; nor in all probability are they capable of specification: but the quarters must be inferred to be such, so far as they may be procurable, as are accordant with the rank and condition of the temporary tenants of them, and in all cases, fit for the safe and comfortable lodging of those to be received in them, whether they be officers or privates.

Much difference of opinion exists, which has often given occasion to disputes between officers and innkeepers, about the room or accommodation which the former have a right by virtue of their billet to claim or insist on; it being a general understanding in the army, founded on the supposed effect of a dictum of an old writer on military laws and customs *, that the superior commissioned officer quartered in any public house has a right to the second best apartment therein. But the saying of *Davis* (the author in question) would not seem to warrant the conclusion drawn from it, or in any way to keep in countenance what is claimed on the score of custom. The remark of *Davis* is to the following effect: "Note, that "a souldier in garrison being furried in a house, is allowed "the best bed and chamber, save one, fair sheetes, board-"clothes, plates, napkins, towels, dressing of his meate, "service at table, oil, vinegar, mustard, candle-light, fire,

* *E. Davis*, who wrote in 1619.

"&c.*" Now this is observed of what is demandable by soldiers *generally*, and not by officers of a superior rank; and it has reference also to a different state of things, *i. e.* to soldiers in garrison, and how they are to be furried therein, and not on the people at large. The times too, at which the author wrote, were more arbitrary, in respect to the quartering of soldiers, than they are at present, being before the petition of rights, that laid the foundation of those regulations, which have been ever since acted on, for the distribution of the troops amongst those classes of the people liable to receive and entertain them.

It might not be unreasonable in garrison, where the civil inhabitants are immediately enjoying the benefit of the soldier's courage and protection, to allot to him the second best apartment of the private dwelling-house; the first apartment being reserved for the use of the family. But it would be extremely inconvenient, and indeed peculiarly burdensome in many cases, as in the instance of the keepers of inns or hotels, who draw their main profit from their bed chambers, arranged often for the accommodation of families, to be entertained for the night, or otherwise, in the course of their travel from one part of the kingdom to another, if the second best apartment should be at all events demandable by the commanding or any other officer on his march. Such an arrangement would necessarily interfere with the entire economy of the inn, and the convenience of travellers in general, to the great detriment of the landlord, and in some degree to the interests of the State; so far as they are connected with the ability of the innkeeper to satisfy the fiscal claims upon him, in the exercise of his calling. It may be seen by a reference to the Mutiny Act†, that this latter considera-

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* This passage is quoted from vol. 1 of *Grose's Military Antiquities*, p. 344.

† 66th clause of the Mutiny Act.

tion is not of too low or mean a character, to have been overlooked in the structure of the regulations respecting the quartering of the forces; the principal inducement to such regulations being declared to be, "that the quarters may be here-" after duly paid and satisfied, and his Majesty's duties of " excise better answered."

It is to be presumed, though the Act is silent on the subject, that the quarters, in its contemplation, must be, if not of a positive quality, certainly not of a negative one. They must not be uncleanly in themselves, undefended from the weather and its effects, or unsupplied with furniture, clothes, and bedding, which are required for the purpose of ensuring warmth, comfort, and refreshment, to the sojourners in general within them; or, even those articles or utensils, which ordinarily form a part of the convenience of officers. If unfit or unsuitable quarters be allotted, there are abundant means pointed out in the Mutiny Act, through the instrumentality of the civil magistrate, to remedy the evil, and which only can be remedied by his agency; for any working of redress for themselves, might be deemed such a violence on the part of any officers, effecting or attempting to effect it, as to bring them within the penalty of the Mutiny Act, for a quartering contrary to the intent and provision of the Act, or of the pains of the 5th Article of the present section.

To give a greater facility to the provision of proper quarters for the troops on march, it is competent to any justice of the peace, on the request of any officer or non-commissioned officer in command of a party requiring quarters, in any case where it shall appear to such officer or justice that better accommodation can be given to the troops, to extend and enlarge the route for that purpose *. And in order that the troops may not be harassed by an unnecessary length of marching, from being billeted wide of the place of quarters,

* 63d clause Mutiny Act.

it is enacted that at no time shall they be billeted above one mile from the place or places mentioned in the route *.

In the case of any particular men or horses being inconveniently quartered, it is in the power of the commanding officer of any regiment, troop, or company, to exchange them for other men and horses, so as he does not thereby occasion any additional burden on the innkeepers concerned.

The regulations, just noticed, apply, in the matters to which they refer, to all descriptions of troops, and officers employed in the command of them in his Majesty's service, including infantry, cavalry, artillery, engineers, royal military artificers, and labourers; the whole being put, as in respect of quarters, on the same footing †. But there are a few particular matters of regulation, referable to the quartering of the foot guards, within certain districts, and of horses attached to the army, which would seem to demand some slight attention.

The provisions as they regard the first, concern only the civil officers employed in the billeting of troops within the city of *Westminster*, and other places adjacent, as specified in the Mutiny Act; with a view to prevent, within such populous places, partiality or abuse in the quartering of the troops, for which they are bound to provide. The high constable is enjoined by these provisions to issue precepts to the petty constables and others, appointed to billet the troops, directing that they shall be billeted, by them, equally and proportionably, according to the number of the troops, on such houses, and such houses only, and in such manner as is described in the Act ‡. The petty constables and others, immediately concerned in billeting the troops, are required to deliver in, upon oath, at any general quarter sessions, and in open court, true lists, signed by them, of

* 50th clause Mutiny Act.

† 130th clause Mutiny Act. ‡ 54th clause Mutiny Act.

all houses, with the number of their inhabitants, subject and liable to receive officers and soldiers, together with the names and rank of all such officers and soldiers as are actually quartered in each house respectively; the lists to remain with the clerks of the peace, and to be inspected without fee. The Mutiny Act also requires, that copies of such lists, if demanded, shall be delivered by the clerks of the peace at a very small specified cost; and awards a penalty, recoverable by distress, against any constable or other, obliged to furnish such lists to the general quarter sessions, for any failure in the delivery, or any defect in the particulars thereof, directed to be stated to the court of sessions*.

These provisions are made, as it may be seen, for the protection of those bounden to quarter the troops, and for the guidance and governance of the civil officers, who are employed in the distribution of them, under the directions of the Act, and have no manner of relation to military officers, or those under their command, either as affecting their rights or duties.

The 55th clause of the Act expressly states, that officers and soldiers of the foot guards shall be quartered within the city and liberties of *Westminster*, and places adjacent, in the same manner and under the same regulations, as in other parts of *England*, in all cases for which particular provision is not made by the Mutiny Act. And no provision is made except as has been immediately explained.

The regulations, in respect to the quartering of horses, have reference as well to bat and baggage horses, and the horses belonging to staff and field officers in his Majesty's forces, when on actual service, if they exceed not the regulated number, as to the horses belonging to his Majesty's horse or dragoons †.

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* 55th clause Mutiny Act. † 56th clause Mutiny Act.

The Mutiny Act subjects all houses, indiscriminately, liable to the quartering of soldiers, to the furnishing of stables, and hay and straw for such horses, as have been described, without distinction, at a rate specified, payable out of the subsistence money.

If horses, provided for by the Act, are billeted on any house where the owner or occupier has no stable, two or more justices of the peace of the division or district, where such owner or occupier lives, may, on complaint made to them by the latter, relieve them from the burden of quartering such horses, on their making such allowance in lieu thereof as the justices shall deem reasonable; who are authorized thereupon to order such horses to be removed and quartered on others who have stables; and to order and direct the allowance so settled, to be paid to or amongst the person or persons to whom such horses shall be removed.

In all places where horse or dragoons shall be quartered, in pursuance of the Mutiny Act, it is ordered that the men, and their horses, except in a case of necessity, shall be billeted in one and the same house, and that in no case whatsoever there be less than one man, where there be one or two horses; nor less than two men, when there shall be four horses, and so in proportion; and then that each man shall be billeted as near his horse as possible.

It has been before remarked, that a commanding officer may exchange men or horses at different quarters for one another, when the exchange in his mind may be for the benefit of the service, so that it occasion not at either quarters an excess of the number originally billeted there. But this act can only be effected through the intervention of the proper civil authority, having the power in the first instance to grant quarters. He is however bound on requisition to

give the billet, when an occasion shall arise, for effecting the proposed exchange.

There is nothing contained in the Articles of War or in the Mutiny Act, relating to the quartering of officers or soldiers in *Scotland;* save that they are to be quartered and furnished there in conformity to the laws in force for such purposes, at the time of the Union, and that no officer shall be obliged to pay for his lodging, when he shall be regularly billeted, except in the suburbs of *Edinburgh* *.

There are various other provisions in the Mutiny Act having relation to quarters, but as they principally interest innkeepers and victuallers, being intended for their protection, and for affording the means of redress in the event of partial or unlawful quartering upon them †, I may be excused in passing them over in this place, where it is my chief business to consider those regulations that affect the military classes, which I have already endeavoured to state and explain.

SECTION THE TENTH.

Carriages.

THIS section consists but of one Article, which is founded on the same ground with those comprehended by the preceding section, *i. e.* to protect the civil order of subjects, who are necessarily brought in contact, from the operative effect of the Mutiny Act, in transactions with the military, from oppressions or injuries that might be offered or practised by the latter, by reason of the force or power placed within their hands, in their relative situations as soldiers. It is the office of this Article to enforce by additional penalties, the

* 84th clause Mutiny Act. † 48th, 53d, and various other clauses.

provisions of the Mutiny Act, touching the supply of carriages, and the protection of the persons of those in charge of them, for the conveyance of his Majesty's forces, on their march, with their various arms, stores, and equipments.

The Article points out *affirmatively*, what a commanding officer of a regiment or of a less body of troops is bound to do, and *negatively* what he is enjoined to avoid, under the pain of *cashiering*, or of such other punishment as a general court martial may deem commensurate with the offence, in accumulation to the pecuniary fines and forfeitures directed by the Act.

The first division of the Article states it to be the duty of every commanding officer, who is about to march in charge of troops, to apply to the proper magistrates for the necessary carriages; and to pay for them as is directed by the Act. To ascertain *who* are the proper magistrates, and *what* the rates to be paid for the carriages ordered by them, a reference must necessarily be made to the Act. From this it will appear that the magistrates to be applied to, are the *justices* of the *peace*, within their several counties, ridings, divisions, shires, liberties, and precincts, through which any regiment, detachment, troop, or company, shall be ordered to march. The application must be grounded on an order commonly called a *route*, from his Majesty, or the general of his forces, or the master, or lieutenant-general of his Majesty's ordnance, if in *England*, or from the lord-lieutenant, or other chief governor or governors of *Ireland*, or from the officer commanding his Majesty's forces there, or other person duly authorized in that behalf, if in *Ireland*. When such order shall be shewn, by the quarter-master, adjutant, or other officer of the corps or detachment ordered to march, to one or more of the justices within their province, he or they are bound to issue out warrants to the constables or petty constables, having local authority to act, requiring them to make

such provision of carriages and horses or oxen, with able men to drive them, as shall satisfy the exigency of the warrants; in which are to be specified the place or places to which the said carriages shall be required to travel, which shall not exceed in distance the days' march prescribed in the route, except in a case of extreme urgency; and shall not in any case extend beyond twenty-five miles from the outset of the march *.

In the event of there not being sufficient carriages within the district where the first application is made, the justices of the peace for the district next adjoining are obliged, on a like application by the like officers, or any one of them, and on sight of the route, to issue warrants to the constables of the latter district, to make up the deficiency.

The quarter-master or other officer demanding the carriages of the constable to whom the warrant is directed, is required to pay, at the time of the demand, into the hands of the constable, for the use of the person who shall provide such carriages and drivers;

One *shilling* per mile for every waggon employed, with four or more horses; and for every wain with six oxen; or four oxen and two horses;

Nine *pence* per mile for every waggon with narrow wheels, or cart, with four horses, carrying fifteen hundred weight or upwards;

Sixpence per mile for any cart or other carriage, with less than four horses, or carrying less than fifteen hundred weight; with an additional sum of four pence per mile for carriages and horses of the quality and number with those mentioned in the first class—

Three *pence* for those of the second; and Two pence for the third;

* 70th clause Mutiny Act.

If an order shall have been made for the payment of such additional sum by the justices of the peace for the particular county through which the troops are to pass at the General Quarter Sessions, in consideration of the high price of hay and oats at the time being; and provided the justice or justices of the peace insert, in his or their own hand, in the warrant issued, the amount of the additional prices to be temporarily paid; the warrant to act as a voucher to the officer or non-commissioned officer commanding the regiment or detachment, for whose use the carriages are demanded.

There are certain preliminary steps * requisite to be observed in respect to the order, to be made by the justices at the general quarter sessions, before it shall be valid or effectual; but as these relate to the duty of the magistracy, and not military officers, to whom the warrant of the justices will be of sufficient authority for the payment, and the receipt of the constable a competent discharge, it is not necessary to take any more than this cursory notice of them.

For the ordinary and extraordinary amount to be paid for carriages, the constable is authorized and bound to give a receipt without stamp.

If the days' march exceed fifteen miles, the magistrate, granting the warrant for impressing the carriages, shall order such further compensation to the owners of them as he deems reasonable, not exceeding, however, the usual rate or hire of such carriages; *i. e.* when used for such purposes.

No waggon, wain, cart, or carriage, impressed by authority of the Act, is obliged to carry above thirty hundred weight †; but none of these carriages may be stopped or

* These are particularized in the 71st clause Mutiny Act.

† 74th clause Mutiny Act.

detained by reason of any weight, notwithstanding the excess, that the owners may permit to be laden thereon; nor are they subject or liable to any penalty or forfeiture therefore nor on account of their being drawn by any number of horses or oxen; it being lawful to such owners to put any additional number of horses or oxen to those prescribed or paid for under the Act; the convenience and facility of the service corresponding in this respect with the convenience of individuals *.

The rates, now noticed, are applicable to carriages furnished in *England*. For those chargeable or demandable in *Ireland*, there is a distinct provision in the Mutiny Act †; which reciting that the rates of carriages in *Ireland* cannot, from various local circumstances, be regulated in the same manner as in *England*, proceeds to enact, that there shall be placed in the hands of the constable to whom the warrant is addressed, to be by him paid over to the owner or owners of any wheel carriage, one penny, and one-sixth part of a penny, for every hundred weight per mile, or reputed mile, which such owner or owners shall take as loading on such carriage, and shall therewith march; or such other rate or sum, as shall be fixed by the justice of the peace, having regard to the price of the provender of cattle at the time.

Owners of carriages in *Ireland* are not obliged to take loading until it shall have been weighed, if it can be so weighed without let or hindrance to his Majesty's service; but the weighing must be at the instance and expense of the owners. And if any officer force the owners to take loading otherwise, or if he put or permit to be put any greater load on any carriage, than the Act allows, at the time of loading or on the march, he is liable to a forfeiture of twenty shillings

* 70th clause Mutiny Act. † 72d clause Mutiny Act.

for every such offence, to be recovered in the manner pointed out by the Act*.

The owners of carriages in *Ireland* are not compellable to carry on them more than six hundred weight, and if they consént to carry more they are to be allowed one penny and one-sixth part per mile for every hundred above that weight: and if the owner of a carriage be required to carry less than six hundred weight, he is nevertheless not obliged to proceed for less than seven pence per mile †.

Notice is required to be given to the lord-mayor of *Dublin*, twenty-four hours previously to the marching of any troops out of that city, except in the case of emergency, and, then, as long a notice is required, as the case shall permit, of the number of troops appointed to march, that the chief magistrate may provide such carriages for their use, as local peculiarities admit, to the convenience of the capital ‡.

The number of carriages, to be allowed to each company or troop in *Ireland*, is to be regulated from time to time by the lord-lieutenant, or other chief governor; and the sums, ordered by the Act to be paid for the carriage of baggage, are to be repaid by the lords of the treasury of *Ireland*, on oath made to the actual payment of such sums by the officer or officers advancing the same, before any justice of the peace, or chief magistrate of any city or corporate town, and an account thereof produced from the agent of the regiment, certified by the quarter-master-general §.

In *Ireland*, as in *England*, constables are to pay the rates, which they have received from the officers of his Majesty's service, to the owners of the impressed carriages, or otherwise they are not obliged to proceed ‖.

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* 75th clause Mutiny Act.
† 76th clause Mutiny Act.
‡ 77th clause Mutiny Act.
§ 78th clause Mutiny Act.
‖ 80th clause Mutiny Act.

Carriages are to be furnished or paid for in *Scotland*, according to the laws in force there at the time of the Union*.

If any high constable or petty constable, or any other person or persons appointed by him for that purpose, shall wilfully neglect or refuse to execute any warrant for the impressment of carriages and horses, or of boats, barges, and other vessels also directed by the Act, or shall demand or receive more than the rates prescribed; or if any other person or persons whatsoever shall wilfully do any act or thing whereby the execution of the warrant shall be hindered or frustrated, every such constable or person, so offending, shall for every such offence forfeit any sum not exceeding five pounds, nor less than forty shillings, to the use of the poor of the parish, or adjoining parishes, where the offence is committed, at the discretion of the justice or justices of the peace; the offence to be prosecuted, as in the Act directed, and the forfeiture to be levied by distress†.

All his Majesty's officers and soldiers, on duty or on their march, and all carriages and horses belonging to his Majesty, or employed in his service, and returning therefrom, are exempt from the payment of any duties or tolls, for passing turnpike roads or bridges, unless it is in *express* terms provided by Act of Parliament, that they shall be equally liable with others to the duties and tolls authorized to be taken‡. As officers and soldiers have a *general* licence to pass free, it will be incumbent on those claiming the tolls to shew the cases of exception, in which they are not privileged. The same privilege does not exist in respect to the passage of officers and soldiers and stores, by boats or barges, in navigable canals; such being in general private property.

* 85th clause Mutiny Act. † 79th clause Mutiny Act.
‡ 81st clause Mutiny Act.

Officers in passing regular ferries in *Scotland*, with troops, may either pass over with their party, as passengers, or hire the ferry entirely to themselves; and in either case will not be liable to pay more than half the ordinary rate. Where there are not regular ferries, officers may agree, and of course charge for boats, for themselves or parties, at the rates that others do in the like cases*.

The exemption from toll is claimable only by officers or soldiers on actual duty or on march, and for horses and carriages actually belonging to and employed in his Majesty's service; in all other respects they will be liable as other persons, to the customary tolls or duties. If any officer travel, for instance, with more horses than the regulation allows, or with carriages or a carriage, neither belonging to his Majesty, nor impressed for the time being into his service, it would not appear, from the wording of the Act, that he would be entitled to the exemption. The being "*employed* "in his *Majesty's service*," must be intended to mean, under some general regulation of the service, or by some particular order or arrangement; neither of which, though they have authorized, and indeed ordered certain officers, even of the infantry, to be supplied with horses, have yet gone so far as to direct that they shall appear at the head, or on the flank, or in the train of their corps in carriages or vehicles of any description. When such are used, they must therefore be considered as for the convenience of individuals, and not, as it should seem, for the public service.

The provisions, to which immediate allusion has been made, are all that need be mentioned in this place, for the guidance of officers in their duty, directly or incidentally, in what is enjoined to them under the first branch of the Article. It is now to be considered from what acts they

* 86th clause Mutiny Act.

are bound to abstain, which are set forth and described in the remaining branch, viz.—

1st. From beating, or abusing, or suffering any person under their command to beat or abuse the waggoners or others attending the impressed carriages.

2d. From suffering more than thirty hundred weight to be loaded in any wain or waggon, or in proportion on carts or cars.

3d. From *permitting* soldiers (except such as are sick and lame), or women, to ride upon the said carriages, unless in cases of emergency, described in the Mutiny Act.

4th. From refusing (when they are not furnished with money for that purpose) to grant certificates, specifying the sums due for the use of such carriages, and the name of the regiment, troop, or company, in whose service they were employed.

On each of these, and in their natural order, an observation or two may be permitted.

1. The *abuse* spoken of in the Article must be supposed, from its being joined with *beating*, to partake something of battery; and not what is sometimes understood under that term, namely, scurrilous and vulgar language or expressions. It would seem to imply any act participating of the violence inferred in beating, though not complete in all it features, such as justling, shouldering, hustling, or the like. An intelligent writer, speaking of this part of the Article, observes, that it applies to the cattle by which the carriages are drawn, as well as the drivers, or persons attending them; and it may be acceded, that they are virtually within the protection of the Article; and if so, it justifies the immediate construction put on the term *abuse*, which could not in any other sense be applicable to animals. Such an act would undoubtedly range under the head of a dis-

order on the march: which a commanding officer is bound to repress*.

2. The offence here, in order to its being sufficiently understood, must be considered with reference to the Mutiny Act, and not as it is to be collected from the simple declaration or description in the Article. The latter makes it criminal in any officer suffering more than thirty hundred weight to be loaded on any wain or waggon, or in proportion on carts or cars (*i. e.* beyond *six* hundred weight), whereas there is nothing contained in the Act prohibiting this, but on the contrary, it is expressly authorized, and to a certain degree encouraged, if it be with the consent of the owners of the carriages, who are saved from any penalty or forfeiture, as it has been shewn, which might arise therefrom. The *loading*, in the intent of this part of the Article to punish, must therefore be presumed to be effected against the consent of the owners; or otherwise it would not appear to be a crime.

3. The word "*permit*," as it is used in this place, is capable of an *active* sense, and not a forced or unnatural one, as a *licensing* or *authorizing* of soldiers or women to ride on the waggons or carriages, referred to; which undoubtedly would be an act of greater offence than is contemplated in the Mutiny Act, being one of a *passive* nature only, a mere *sufferance* of an abuse. The words of the Act are "or shall "*suffer* any soldier to ride in the waggon," &c.

There being this distinction between one and the other act, it is most reasonable to suppose that the offence meditated here, is of an aggressive quality, and therefore thought deserving of a greater punishment than the pecuniary fine or forfeiture directed by the Act, such as is adjudicable under the present section. But if the Mutiny Act and Articles of

* See the last Article of the preceding section.

War are supposed to relate to or to describe one and the same offence, it will always be a fit matter of consideration with the court martial, when forming their judgment of the discretional punishment awardable to it, whether the offender has previously suffered a forfeiture, or is likely to suffer it; as also the expiable nature of the offence under common circumstances, in the eye at least of the legislature, by a small pecuniary fine.

The cases of exception, where officers may permit soldiers and others to ride in the carriages are two. The first *general*, on the event of the sickness or lameness of soldiers on the march—the second *special*, on the emergency of the public service, as specified in the 73d clause of the Mutiny Act, which authorizes the impressment, for the existing occasion, of extraordinary carriages, horses, boats, barges, and vessels, and the loading and carrying upon them, respectively, not only the arms, clothes, accoutrements, baggage, tents, and other equipage of the regiment or detachment, to be provided for, but for the sake of speed and despatch, officers, soldiers, servants, women, children, and other persons of and belonging to the forces *. As the clause of the Mutiny Act, authorizing the carriage and conveyance of the persons just mentioned, relates to a particular case, which can seldom occur, and which, when it happens, must be distinctly declared, and provided for by an especial order, which is to justify the proceedings under it, it may be sufficient thus generally to mention it, recommending a more particular reference to the clause, when the occasion shall require, by those who may have to govern themselves by it.

4. The offence pointed out in this the last branch of the section is manifest of itself.

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* Vide 73d clause Mutiny Act.

In addition to the penalties declared by this section, officers are liable to certain forfeitures, for several malversations, having reference to the employment of carriages and horses, by virtue or under colour of the Act, which may be thus summarily noticed.

For forcing and constraining any waggon, wain, cart, or carriage, to travel beyond the distance specified in his Majesty's warrant;

For not discharging such carriages in due time for their return home on the same day, if it be practicable;

For suffering any soldier or servant (except such as be sick, or any woman) to ride on any of such carriages;

For forcing any constable, by threatening or menacing words, to provide saddle horses for themselves, or servants, or forcing horses from the owners by themselves, servants, or soldiers;

The forfeiture for every one of these offences is five pounds, to be recovered, not through the medium of a court martial, but on proof on oath before two of his Majesty's justices of the peace of the county where the offence is committed, who are to certify the same to the secretary at war in *England*, or the chief secretary or the under secretary for the military department in *Ireland*, who are required to give orders for deducting the amount out of the offender's pay *.

* 70th clause Mutiny Act.

SECTION THE ELEVENTH.

Of Crimes punishable by Law.

THE Articles, embraced by this title, inculcate and enforce the amenability of soldiers to the demands of the known laws of the land—by making officers of all descriptions subservient to and aiding in the service of the process of the civil courts, to bring alleged offenders, or debtors of the military class, within the reach of the arm of civil justice.

ARTICLE 1st.—The first Article is founded on, and indeed adopts the language, almost *verbatim*, of the 17th clause of the Mutiny Act, in so far as respects the description of the offence therein described. It requires that the commanding officer and officers of every regiment, troop, company, or detachment, upon application duly made by or in behalf of the party or parties injured, shall use his and their utmost endeavours, whenever any officer, non-commissioned officer, or soldier, under his or their command, shall be accused of any offence against the persons or property of his Majesty's subjects, punishable by the known laws of the land, to deliver over the accused person or persons to the civil magistrate; and to aid and assist the officers of justice in apprehending and securing them, in order that they may be brought to trial. It then proceeds, after prescribing the duty, to award a penalty against the breach of it, by adding, that if any commanding officer or officers wilfully neglect, or refuse to deliver over such accused persons to the civil magistrate, or to aid or assist in the apprehension of them, on a due ap-

plication to that effect, the parties so offending, on conviction thereof by a general court martial, shall be *cashiered*.

The offence which is set forth in this Article as a military one, is treated merely as a civil misdemeanor in the Mutiny Act *; and is rendered liable to prosecution either by information or indictment in any of his Majesty's Courts of Record at *Westminster*, or in any of the said courts in *Scotland*, or in *Dublin*. But the offender, on conviction, is subject to a complicate punishment, affecting his military, as well as civil relations; for besides the liability to the penalty applicable to the misdemeanor at law, he is to be deemed and taken to be *ipso facto* cashiered, and utterly disabled to have or hold any *civil* or military office or employment, within the United Kingdom of *Great Britain* and *Ireland*, or in his Majesty's service †.

The punishment under the first Article of the section is not discretional but peremptory, but it is yet more lenient than under the Act; and from the consideration, possibly, that the offence may be prosecuted, even after conviction before a general court martial, in the civil courts, before which the plea of *autrefois acquit*, or *convict*, in the military courts, would be of no avail. Unless some severe penalty had been interposed, as here, it would have been in all cases difficult, and in many hazardous to enforce in garrisons or the stations of the troops the processes of the civil tribunals.

The offence described in the Article, and also in the Mutiny Act, is the *wilful neglect* or *refusal* of an officer in command, to deliver over to the civil magistrate, or to aid and assist the officers of justice, on *due application*, in appre-

* 17th clause Mutiny Act.

† A certificate of such conviction is ordered to be transmitted to the judge-advocate in *London*, if it take place in *Great Britain*, or to the judge-advocate in *Dublin*, if in *Ireland*.

hending persons *accused* of certain crimes specified. So that to constitute the offence there must be three co-operating acts: there must be,

1st. An officer or soldier *accused* of one of the species of crimes mentioned in the Article:

2d. An application, duly made, to the commanding officer:

3d. A wilful neglect of such application, or refusal to aid or assist the officers of justice in apprehending the accused; any of which being wanting, the crime will not be perfect.

1. What is intended by the term "*accused*" is not explained; but it must be understood to mean a person implicated in some charge brought under the cognizance of a magistrate, on the information and oath of some informant; and not a person involved in some sudden or informal complaint, urged by one supposing himself to be aggrieved. In the latter case the commanding officer would appear to be without authority to inquire into the truth or falsehood of the accusation, so as to govern himself by it, and without excuse if he should act wrongfully.

If "*accused*" intends one regularly *informed* against before the civil magistrate, which would seem the natural construction, this is capable of being shewn to the commanding officer, in the evidence of some instrument under the hand of the magistrate, in the form of a regular warrant, or some other solemn requisition grounded on the information, received by him, or, on his personal knowledge of the offence, as the case may be: in either of which cases, the commanding officer would be bound to give up the person implicated to the civil magistracy; but not otherwise. For it hardly could be conceived, that on every occurrent case of private accusation, however rashly or inconsiderately made against any of those under his command, the commanding officer is obliged to deliver them over to the civil

magistrate at all events—Or what might become of the public service, if it were liable to be interrupted on every occasion of idle quarrel, or the possible collusion of parties?

2. When application shall be deemed to have been "*duly* made," or not, it is the province of the court martial to determine, and must depend on the interpretation put on it by such court, on consideration of the circumstances under which it shall have been made in the particular case. This will be governed, it is supposed, not by the *time* or the *manner* merely of the application, but on the ground or merits, as they shall be made apparent to the commanding or other officer, on which the application is founded; *i. e.* of the immediate construction indulged, of the *force* of the term "*accused*," shall be taken to be correct.

In every construction of the words "*duly* made," such an application must be imported, as may be sufficient to satisfy the officer to whom it is made, that he is legally called on and authorized to interfere. Any other application could be viewed only in the light of a simple and individual request, which, however respectable, in as much as relates to the party making it, could not warrant of itself the act that the commanding officer is desired to execute, and which would amount to an assault and false imprisonment, if circumstances, when they came to be investigated, should not justify the arrest. It is humbly conceived, that the application, to be *duly* made, should be accompanied by a warrant or some authority from the civil magistrate, to authorize the proceeding required of the commanding officer under it.

3. Of the last ingredient in the offence, the *wilfulness* of the *neglect* or *refusal* of the commanding officer, "to deliver "over the *accused*," or "to aid the civil officers in appre-"hending him," the Article itself is abundantly explanatory. From the duty which it creates, we may form a

proper notion of what will amount to a breach of it. It requires an officer, as it has been shewn, to do his *utmost* endeavours to deliver over the accused, and to aid the civil officers in apprehending him; whence it must be presumed, that if he fail to pursue any of those clear and plain measures, which common sense or common practice point out to the due execution of his duty, he will be guilty of the alleged neglect.

The Article supposes, that the *accused* is under the control and within the reach of the ordinary power of the commanding officer, who, on that account, it should seem, is made an agent in his arrest. So that the endeavours, which he is ordered to use, must be construed with relation to the immediate state of his power over the person of the accused—*i. e.* if he be within the range of his local military authority. If he shall be *beyond* it, the commanding officer, it is conceived, can be no more concerned, or obliged to make use of extraordinary efforts, or means, than any other of the king's subjects, in the apprehending of him.

The *refusal* must be meant to be an *absolute* one, and in so many words, for if *negative* only, it would fall within the meaning of a neglect.

ARTICLE 2d.—To prevent any colourable protection being afforded to individuals, either under a military plea or military influence, this Article enjoins that no officer shall protect any person from his creditors, under *pretence* of his being a soldier, nor any non-commissioned officer or soldier, who does not *actually* do all his duties *as* such, and no further than is allowed by the Mutiny Act, under pain, on conviction by a general court, of being *cashiered*.

The protection to which this Article refers, and beyond which it is not permitted to extend, is described and authorized under the 118th clause of the Mutiny Act; by virtue of which it is permitted to any superior officer, as well

as the soldier himself, to prefer a complaint to any one or more judges of a court of record, out of which any process or execution shall have issued, and on which a soldier shall have been arrested contrary to the provisions of the Act, in order to the summary discharge of such soldier without fee, and to the recovery of the costs incurred in seeking his discharge.

This clause of the Mutiny Act is *expressly* introduced, for the purpose of preventing unjust or fraudulent arrests that may be made upon soldiers, whereby his Majesty and the public may be deprived of their service. And to this end it enacts in substance, that no person who is or shall be enlisted, or shall enter as a volunteer in his Majesty's service as a soldier, shall be liable to be taken thereout, by any process or execution whatsoever, other than for some criminal matter, unless for a *real* debt, or other just cause of action; and, unless before the taking out the same, affidavit shall have been made before one or more judges of the court of record, out of which such process or execution shall issue, or before some other authorized person, that the original sum justly owing to the plaintiff from the defendant, and for the recovery of which the process or execution is sued out, amounts to the value of twenty pounds at *least*, over and above the costs of suit in the same, or any other action on which the same shall be grounded; a memorandum of the oath or affidavit to be marked on the back of the process or writ without fee: and if any one shall be arrested contrary to the intent of the Act, it shall be lawful for one or more judges of such court of record, on complaint thereof made by the party himself, or any his superior officer, to examine into the same by the oath of the parties, or otherwise, and to discharge such soldier so arrested, without any fee or fees, upon due proof made, that such soldier was legally enlisted as a soldier, and arrested contrary to the intent of

the Act; and also to award reasonable costs, for the recovery whereof he shall have the like remedy that the person suing out the execution might have had, or the plaintiff might have had, if he had obtained judgment against the defendant in his action*.

As the summary remedy provided by this Article is for the benefit of the public, as well as the protection of the *bonâ fide* soldier; officers are forbidden by the 2d Article of this section, to make themselves instruments in obtaining it for parties, under the *pretence* of their being soldiers, when in fact they are *not* so; or for others, who may have been enrolled as such, but who have never done, or have ceased to do, or are not at the time doing the actual duties of soldiers. The offence will therefore be consummated as well in the instance of affording protection to persons who are not discharging military duties at the instant, as in the case where they have never had any to perform, and where they are merely colourably set up to screen individuals not covered with a military character from the ordinary course of the law. As the benefit of the clause is intended only for soldiers, officers are precluded, under the penalty of the Article, from lending themselves as the means of extending it to those who are not entitled to it. If the king's service is not to be interrupted by a fraudulent arrest, the public is also to be guarded against abuses under the mask of the king's protection.

It will not be wholly out of place to remark, that officers and soldiers, imprisoned on a criminal charge, are not entitled to demand or receive any pay during the term of their confinement—unless they shall be *acquitted* of the charge or charges for which they shall have been committed; and in that case they will be entitled, on return to their respective

* Vide 118th clause Mutiny Act.

corps, to all arrears of pay, growing due, during the time of their confinement. But if they should be *convicted*, they forfeit all right to any pay from the inclusive date of the commitment to the day of their return to the regiment or corps to which they belong. A discretion is left with the secretary at war, or if in *Ireland*, the chief secretary, or in his absence, the under secretary in the military department, in such cases as he may judge fit and expedient, to order the issue of pay in full or in part, or any arrears thereof, to officers or soldiers so confined, or after they shall have been discharged, on conviction or otherwise*.

Non-commissioned officers and soldiers also forfeit all right to pay during the term of their imprisonment in any common goal, public prison, or house of correction, under sentence of a general or other court martial, authorized by the 24th clause of the Mutiny Act; such pay, or the greater part thereof, being devoted, under a subsequent clause of the Act, to the subsistence of such non-commissioned officers or soldiers, while they may continue in custody. It is lawful however, for the secretary of war, or the said chief secretary, or the said under secretary in *Ireland*, if he should think fit, to order the issue or payment of any arrears or surplus of such pay, or any part thereof, to such non-commissioned officers or soldiers during or after the period of their imprisonment †.

This discretion is left with the state officers, just described, to mitigate, as it is supposed, in the one instance, the hardships of confinement, or the rigours consequent on conviction by the civil courts, in particular cases, where officers or soldiers may have acted in nice or difficult situations; and, in the other, to abate what to them may seem the too severe consequences of particular military sentences.

In no situation of arrest and confinement for debt, in any

* 19th clause Mutiny Act. † 26th clause Mutiny Act.

prison, goal, or other place, is a *soldier* entitled to the whole or any part of his pay, from the day of his arrest to the date of his return to his corps *.

Officers are not included by name in the clause of the Mutiny Act, which takes away the title to pay from soldiers generally in the case of confinement, civil process, and execution; but they may be understood to be included under the term soldiers, and certainly come within the spirit of the clause. Military service is the consideration, in all cases, of military pay, and if soldiers be lawfully precluded from receiving it where they are not able to render that service, the performance of which alone can entitle them to receive it, officers on the same principle, for the service, rendered by them, is only a modification of the same service endured by ordinary soldiers, must also be precluded in the like case, unless a different measure of justice should be supposed to be dealt out by the legislature to one and the other. Now there is nothing contained in the clause, or in the Act to warrant a conclusion, that any exception was intended in favour of officers, and nothing in the principle, on which the clause of the Act is evidently founded, that could tolerate such a distinction. It is but fair then to infer, that officers are embraced by the general term soldier, a description common to both, though it be not a term strictly convertible in all the circumstances of resemblance or relation.

SECTION THE TWELFTH.

Of redressing Wrongs.

THE Articles, now falling under consideration, are framed for the purpose of affording a speedy and efficacious remedy

* 120th clause Mutiny Act.

to officers and soldiers, who find or consider themselves oppressed or aggrieved by the acts of their superiors; affording an opportunity to the supposed authors of the injury complained of, in the one case, to repair it with their own hand, or authorizing the carrying of the complaint by the alleged sufferer, in a direct course, to a higher tribunal; and, in the other, ordering, without qualification or condition, a regimental court martial, on a complaint preferred to the commanding officer of a regiment for that purpose, to be thereupon summoned, for doing justice to the complainant; and allowing an appeal from the sentence of such court martial, if the complainant or the defendant shall be dissatisfied therewith.

In this arrangement, it will be seen, that a peculiar preference is given to private soldiers, in hearing and determining their alleged grievances; for whilst the complaints of officers must be submitted to the consideration of different intermediate authorities, to be by them sustained or not, on their intrinsic or apparent merits, an investigation into those of private soldiers is demandable in the first instance, ex debito justitiæ, as a matter of right. If the necessary influence of officers over those subjected to their command be thoroughly considered, a word need not be added in justification of the preference shewn to the latter, in respect of their complaints, in the Article in question; though it may be willingly admitted, that there is a natural promptitude in officers, redounding much to their credit, springing out of the close relation subsisting between them, and the soldiers placed under their especial command, to see that they are not in any way oppressed.

Of the power confided to the hands of commanding officers, in relation to military offences, and of the benefits that may result from a judicious use of it, I have spoken on other occasions, and am therefore not disposed to dwell

on it, in a place where the exercise of it must be so evidently important.

ARTICLE 1st.—This relates to commissioned officers only, and provides, that

"If any officer shall think himself wronged by his colonel, "or the commanding officer of the regiment, and shall, upon "due application made to him, be refused to be redressed, "he may complain to the general commanding in chief the "King's forces, in order to obtain justice, who is hereby "required to examine into such complaint; and either by "himself, or by the secretary at war, to make his report to "his Majesty thereupon, in order to receive his further "directions."

The course for the prosecution of the complaint preferred by an officer, for a private or personal injury offered or done to him, by a supposed abuse of power by his commanding officer, would seem to be pointed out, so far as the cases are parallel to one another, by the practice observed in respect to civil magistrates, who, before action brought or proceedings instituted against them, are entitled to notice from the complainant; that they may have a space for repairing the injury, or for tendering amends*.

This order of procedure is prescribed, to prevent magistrates, who may have erred from inadvertency, from being harassed by vexatious actions. And a like protection would appear to be extended, through the medium of this Article, to commanding officers, who may err in the discharge of their office, which is a most responsible one, from the same cause.

This Article requires that the complaint of the individual injured, or alleged to be injured, shall in the first place be urged to the breast of the commanding officer, to whom application shall be made at the same time for redress. The

* By the 24th *George* the *Second*, c. 44.

particulars of the injury, which may be either foregone, or still pressing, should be formally stated to the colonel or commanding officer, in *writing*, for the greater certainty, or otherwise, as the party may choose to proceed; and the former should in the same formal manner be called upon to redress the represented grievance; in order that he may be apprized of the real ground of the complaint and the expected redress, and may regulate himself accordingly. If after this representation of the wrong suffered by the individual, the commanding officer shall *refuse* to redress the same; the former will be at liberty to prefer his complaint to the general commanding in chief. The *refusal* must be an absolute one, or there must be such a neglect of the complaint or application on the part of the commanding officer, as shall constructively amount to a denial of redress or justice, either from the lapse of time, or failure of proceeding towards a reparation, before the complainant will be authorized to betake himself with his complaint to the military chieftain.

But though the Article allows a reference to the commander in chief, on the *refusal* of the colonel to do the complainant justice, yet the latter, by the rules and customs of the service, is obliged to make his immediate commanding officer *the medium* for sending his complaint to head quarters, that the superior officer may see, as I apprehend, that the complaint addressed to the commander in chief is the same in substance with *that*, which he was previously required to redress; and that he may have a further space for repentance from his original determination, or an opportunity for forwarding with the complaint such explanation of his own conduct, as he may be desirous of offering.

A *direct* application to the commander in chief, or otherwise than as regulated by this Article, is regarded, in a military point of view, not only as an irregularity, but as a positive offence. A specific charge was brought by *Major Ross*,

of the 21st regiment, against *Lieut. J. Goff* of the same regiment, which was expressly grounded on this Article, and of the following tenor:

"For contempt of the 1st Article of the twelfth section "of the Articles of War, in stating his being aggrieved by "me [*Major Ross*] his commanding officer, to his excel-"lency the commander in chief, without my knowledge."

On this and other charges *Lieutenant Goff* was found guilty by a general court martial, at *Palermo* in *Sicily*, in the year 1812, and cashiered.

Lieutenant W. M'Veagh, of the 77th regiment, was tried on a similar charge, at *Lisbon*, in the same year, but it was not stated to be specifically founded on the 1st Article of this section, but alleged generally as a breach of good order and military discipline *.

If a complaint be regularly addressed to the colonel or commanding officer of a regiment, for the purpose of being forwarded through him to the commander in chief, and he refuse or neglect to forward it in a reasonable time, it is then open to the complainant to send it in a direct course, and to state such refusal or neglect as an additional grievance.

The general in chief, when the matters of alleged grievance come thus regularly under his cognizance, is required by the Article, to examine into the same, and to make his report

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* The charge was couched in the following terms:

"For unofficerlike and ungentlemanlike conduct, in preferring charges, "dated *Lisbon*, 9th of August, against his commanding officer, *Lieutenant-"Colonel Bromhead*, through the irregular channel of the major general "commanding in the first instance, being subversive of good order and "military discipline, after charges had been delivered to him, *Lieutenant "M'Veagh*, by the adjutant of the regiment on the day preceding, and "after having actually been in arrest."

The latter circumstances in the charge were stated by way of aggravation, shewing the incompetency of the party, so involved, from the rules of the service, to prefer a complaint at all, or, at least, till he should have been delivered from the temporary disability described.

directly, or through the secretary at war, to his Majesty thereupon, for his further direction.

It might be thought at first sight, that the General is bound to make a report to his Majesty, in one or other of the ways directed, on every subject of complaint submitted to him. But the duty enjoined to him, of inquiring into the circumstances of the grievances represented to him, vests him, it should seem, with a discretion of judging of the truth or not of the matters represented; and as they should appear to him to be founded or not, either to forward them, for further inquiry, or to withhold them from the dernier source of redress. For if the matters of charge should be incapable of proof, or the means of it should be clearly wanting; or if, as it often happens, the grievances stated should not amount to a crime, or none at least of military cognizance, or should be above or below the notice or jurisdiction of a court martial; it can hardly be intended or imagined that the General should trouble his Majesty with a report. The practice, indeed, is against such a supposition, it being no unusual thing for a General Commanding in Chief, when he perceives that the subject of representation has been manifestly misconceived, or that, from the statement of it, it is incapable of being supported in evidence, or that it has been met, *in limine*, with so complete and full a denial, not possibly to be shaken by any contrary evidence, to return the accusatory representation to the complainant for his reconsideration, and sometimes with an admonition that it may be finally withdrawn, or peremptorily to refuse the transmissal of it, as the case may warrant, with his report, to the supreme head of the army. This practice, in a variety of instances, that might be quoted, is most beneficial to the party supposing himself aggrieved, who often is led away with an erroneous impression of an act, conceived to operate a wrong, which may turn out, on dispassionate examination, to be nothing more than a demand

or discharge of a just, but perhaps an unwelcome duty. And in no instance could it be seriously prejudicial to the complainant, since he may reiterate his complaint to the General in Chief, if he chooses not to accede to the primary decision or recommendation, and require, if the confidence in his own cause should outweigh the counter opinion of the General, that the statement of his grievance may be brought under the eye of his Majesty. Even if the General should be disposed not to hearken to the second application or to forward the complaint to the proposed destination, the officer, imagining himself injured, will still have it in his power to address himself directly by petition to the Crown, which is approachable on every occasion of supposed injury, calling for the royal interference, by the military, as well as civil subject.

ARTICLE 2d.—This describes the proceeding to be observed by an inferior officer or soldier for redressing any wrong, which he supposes himself to labour under.

Any such officer or soldier, thinking himself wronged by his captain or other officer commanding the troop or company to which he belongs, is directed by this Article to complain thereof to the commanding officer of his regiment, who is required to summon a regimental court martial for the doing justice to the complainant.

The wrong, intended to be remedied, must arise out of the immediate act of the captain or commanding officer of a troop or company, towards one placed under his particular command, in an excess or abuse of the official authority exercised by the one over the other, *i. e.* the *wrongdoer* or *agent* must be the captain or other temporary commandant of a troop or company, charged with the whole internal economy thereof; and in consequence vested with especial authority over the affairs of such troop and company: and the *patient* or *sufferer*, either an inferior officer or soldier,

under his direct command. These must be the relations of the parties to one another, as the *wrongs*, arising out of them are the only ones within the contemplation of the particular and especial remedy provided by this Article. Injuries growing out of the acts of other persons, not so related, are foreign to the regard of the Article, and are to be prosecuted through the means of the general provisions, for the administration of justice to the army, contained at large in the Mutiny Act, and the Articles of War.

As the remedy appointed is a very summary one, and in relief of immediate sufferers from acts of oppression by the hand of power, (a special case) it follows that none but direct sufferers, parties complaining of substantive wrongs suffered in their own person or properties, are entitled to the remedy. Informants, on the behalf of others, no matter with what motive they may be impelled, are virtually excluded from the benefit. The *complaining* must be the *suffering* party, and he alone.

Nor are soldiers authorized, under the Article, in joining and clubbing their complaints together, so as to present a formidable and united whole, in the supposition that one complaint may support the credit of another, and so to give a countenance and to draw a consequence from the very circumstance of the numbers. Such a mixture of complaints, from an idea of *juncta juvant*, would not only be subversive of the first and best principles of the military union, but repugnant to those of natural justice, which demand that every individual, when accused, shall have a distinct trial and acquittal or conviction, in every criminal matter objected to him. The very joining in such complaints would argue such a pre-understanding of parties, and such a combination, as is wholly inconsistent with military notions, and might, if tolerated, bring about that evil, which it is clearly the intention of this Article to prevent, by

affording a sure and speedy remedy to injuries as they occur, and thus to preclude an accumulation of complaints which might give rise to a general murmuring in the ranks, and terminate in consequences too obvious to be noticed.

The individual, supposing himself wronged, is to carry his complaint without any circuitousness, to the commanding officer of the regiment, who is thereupon required, as we have seen, to summon a regimental court martial, "for the "doing justice to the complainant."

The commanding officer of the regiment has no discretion to exercise, like the General in the former case, but is absolutely obliged to assemble a regimental court martial forthwith; or in such reasonable time as the case may admit.

If the soldier substantiate his wrongs before the regimental court martial, the court will of course order the existing grievance, if such be complained of, to be abated or removed, or if any previous wrong, capable of being remedied or recompensed, that the complainant be put in possession of his right, or compensated for it, as the case may require; with which order the defendant (the captain or other officer) is bound to comply, or if otherwise advised, may appeal to a general court martial.

It is evidently a personal wrong, either subsisting or foregone, and of such a nature, as is capable of redress, that the Article has in view: for it aims not further than the doing "justice to the *complainant*," and shews not any design of punishing the wrong doer. If such had been the intention, another court than a regimental one would have been selected for that purpose, it being clear that the latter has not a jurisdisdiction large enough to such an end; though sufficient, in the way described, to enforce the remedy intended.

If the wrongdoer should decline or neglect to appeal to the higher military court, or refuse to obey the order of the

regimental court martial, the colonel or commanding officer who appoints the regimental court will have to see, if he approves the same, that the sentence be carried into execution; or otherwise the whole proceeding would be nugatory. There can be no doubt of the power, any more than of the means of the commanding officer to give efficacy to the sentence, and of vindicating, if it shall be obstructed or contemned, the authority of the regimental court martial*.

But if the *punishment* of the commissioned officer had been intended in the proceeding directed by this Article, it is to be presumed, that a general court martial would have been ordered to take cognizance of the complaint in the first instance, as it alone is competent to adjudge punishment, from their degree, to the supposed offenders; and a course also would have been pointed out by which it might have been awarded at all events, in which the Article is wholly deficient. The soldier, it is plain to see, cannot appeal to a general court martial, because the regimental one has ordered *that*, which is on all sides admitted, that it is incompetent to order. So that the reason of the appeal, as respects him, must wholly fail. And the officer is not obliged, nor could he be expected to appeal, to aggravate the circumstances of the original sentence.

If *punishment* was in any way in the intention of the Article, it must not have looked to it as an ingredient in the

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* Tytler says—

"The reason why a power of appeal is declared to be competent of absolute right to inferior officers or soldiers complaining of being wronged "by their superior or commanding officer, is, that a regimental or garrison "court martial have not the power of inflicting any punishment on commissioned officers: they can do no more than express their opinion, that "the complaint is just, or the contrary, and restore the sufferer against "any existing grievance, and the injury complained of, however flagrant, "must therefore have remained unredressed, as far as punishment is concerned, if an appeal to a general court martial had not been declared to "be a matter of right to the party aggrieved." Page 336.

inquiry; but as an external consequence of it, from a recommendation of the colonel, or some other superior officer, having the control and superintendence of the internal concerns of the particular regiment, or the army at large, that an ulterior proceeding should be had for the purpose.

If the sentence should be against the complaint of the private, he may also, if he thinks himself aggrieved, appeal to a general court martial. If the appeal, in either instance, be deemed vexatious or groundless, the appellant may be punished at the discretion of the said general court martial.

It is to be observed that the summary remedy afforded by the Article is in favour of the inferior officer and soldier; and is therefore to be promoted by the commanding officer to its full extent. Should the party imagining himself wronged be unable to sustain his complaint by the requisite evidence before the regimental court martial, he is not in the contemplation of the Article, in any way culpable or punishable on that account; though a contrary notion seems to prevail in the army to that effect.

The benefit of the Article would be more than doubtful, if it could not be sought but at the hazard of a severe military chastisement, and more particularly when the accusation might fail from ignorance or inadvertency in the manner of conducting the prosecution, rather than through any defect in the merits of the complaint, if the party had known how to bring them out. In a provision, professedly founded on the principle of succouring the weak against the oppression of the strong, it would be monstrous to suppose, that at the time it encouraged a free complaint of grievances, it should denounce a heavy punishment, as a sort of counterbalance to such encouragement, in the event of a misconceived injury, or an ill-conducted prosecution. He must be a more confident suitor for military justice than is ordinarily to be found, who would seek it, at all events,

with the fear of the triangle before his eyes, nor would such a motive be for the cause of justice, since it might influence bad minds, after they had preferred an otherwise untenable complaint, to endeavour, from an apprehension of the consequences, to support it by undue means. But no such apprehension ought to be entertained here, since the Article is most explicit and satisfactory on the subject, and is impossible to be misunderstood by any one, who shall give it a proper consideration.

The punishment adjudicable, by the Article, is on the failure of an *appeal* to a general court martial, and *not* of the original complaint. This is most pointedly expressed, and in a way to exclude any possible ambiguity, for the Article concludes; "But if, upon a *second* hearing, the appeal "shall appear vexatious and groundless, the person, so "appealing, shall be punished at the discretion of the said "*general* court martial."

The first or regimental court martial, then, has no power to punish, under any circumstances of failure; nor has the *general* court martial, even on an appeal, or *second* hearing, without it shall find the appeal to be "*vexatious* and "GROUNDLESS." It is not difficult to collect the reason or distinction, on which the Article proceeds.

A regimental court martial is a tribunal at the home or door, as it were, of the complainant and defendant, and to which neither of them can suffer much trouble or expense, in carrying their causes for decision. Nor can the assembling of the court, generally speaking, be a matter of any considerable inconvenience either to the members of the court, or to the public service. But a general court martial, on the other hand, can seldom be assembled, without interfering with the distribution of the army, and drawing together from distant stations the members that are to constitute the general court, a circumstance productive of a certain degree

of personal inconvenience to individual officers, and sometimes of hindrance or delay to the public service. It may also occasion no inconsiderable trouble or charge, to the Crown, and to the parties, in the removal of themselves and witnesses to the place, possibly at some distance, where the general court martial may be holden.

The possible occurrence of all or any of these inconveniences should discountenance the rash removal, in any case, of a complaint from an inferior to a higher tribunal; and when a full and decided judgment, negativing the foundation of the alleged grievances, has already been pronounced by a court, peculiarly competent to form a correct opinion of all the circumstances in dispute, as well as of the personal characters of the parties, and witnesses. But if a military suitor should be so inconsiderate, as to draw no warning from the *first* judgment, or so litigious as to rush on heedlessly into a *second* litigation, not only without receiving any fruit from the contention, but without the least show of merit in his favour; he is no longer an object of the humane protection of the Article, but a fit and proper subject of reprehension and of punishment; still the punishment is allowed not to fall even on the inconsiderate appellant, unless he join with his rashness a vexatious and harassing spirit, evinced in the *groundlessness* of his plaint.

The power lodged in the hands of the general court martial to award such punishment, as in its judgment shall seem meet, to the promoter of a repeated and unfounded accusation, is still to be discreetly and tenderly used, and only in those cases, where there is no *probable* cause or ground for the appeal, and when it shall appear to the court to have been prosecuted for oppressive or malicious purposes; or otherwise it might act as a discouragement to a fair and innocent appellant, who might have entertained an honest, but erroneous impression of his case.

The principle, just considered, has been long acted on, and is evidently assumed from the Articles of War, made and published by *James* the *Second**. At that time regimental courts martial had a general jurisdiction, which was ordinarily resorted to, over all disputes, between soldiers and their captains, or other officers, and between soldier and soldier, relating to their military capacities; and an appeal was allowed, in all cases, to a general court martial, when parties conceived themselves aggrieved by the decision of the primary courts; but if the appellant made not good his suggestion, recompence was to be made to the other [the respondent] for the *trouble* and *charge* of such an appeal†.

As private soldiers, in modern times, might not generally have the means of defraying the expense or costs of an appeal, it has become necessary perhaps to substitute corporal punishment in the room of pecuniary amends. But there would seem no just reason, why the charge attendant on a wrongful appeal should not yet be made good to the aggrieved party by a commissioned officer, on the spirit of this Article; founded as it appears to be in a military usage and custom.

In the case of inferior officers, the practice of former days resembled yet more nearly the course of our own. The colonel or actual commanding officer of a regiment had, of *himself*, the power of hearing and redressing, on due proof exhibited before him, the wrongs of officers occasioned by

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* The 57th article of this compilation is to the subsequent effect. "If "any inferior officer, either of horse or foot, be wronged by his officer, he "may complain to his colonel, or other *superior* officer of the regiment who "is to redress the same, upon due proof made of the wrong done him; but "if he [the colonel or superior officer] fail therein, the party grieved is to "apply to the general officer for redress; and if the accusation be false, the "complainant is to be punished at the discretion of a court martial.

† According to the 50th and 51st articles, of the Articles of War of *James* the *Second*.

the acts of those set immediately over them; with a right of appeal, to the General, reserved to the party grieved, if his colonel should fail to redress the injury complained of; but if the accusation proved false, the complainant was rendered liable to punishment at the discretion of a court martial. Thus it was not until two competent authorities had pronounced a complaint false or groundless, that a soldier could be deemed culpable in prosecuting what he deemed and alleged to be a personal wrong, nor was he then punishable, but by the ulterior determination of a court martial.

But though I have endeavoured to shew that soldiers are not the objects of punishment, in prosecuting their supposed wrongs, under the letter of the present Article, unless they pertinaciously persist in a false and groundless accusation; I do not mean to contend, that they are not punishable in the first instance, if they prefer any general complaints, or one of the nature described in the Article, in any other manner than is therein directed. Whilst a fair and open representation of grievance is not only tolerated, but promoted, a discouragement is thereby held out to clandestine, unmanly, and unmilitary charges, to the secret prejudice of those against whom they are intended to operate.

A precedent of this is afforded in the case of *Serjeant Cochrane* of the 2d battalion, 63d regiment of foot; who "was arraigned and convicted of *unsoldier-like* and *irregular* "conduct, in having in the month of June, 1813, written and "sent to the general officer commanding at *Colchester*, a "letter dated the 17th of that month, containing ground-"less, vexatious, and injurious charges and complaints "against *Major Philip Le Geyt*, of the 2d battalion, 63d "regiment, as his commanding officer; such conduct being "*subversive* of *good order* and *military discipline*, and in "breach of the Articles of War."

The serjeant was sentenced, after a formal investigation,

to be reduced to the ranks and to receive five hundred lashes*.

The offence consisted not only in the preferment of groundless and vexatious charges; but in the forwarding of them, by an unmilitary and unauthorized medium, for the purpose of prejudicing the commanding officer of the regiment in the eyes of the General. From an unfavourable presumption arising out of a complaint, thus privately and secretly urged, instead of being prosecuted through the course pointed out by this Article, it is probable that the accused was ordered to be converted into the actual prosecutor; still, however, with an observance of justice, in leaving the merits of the serjeant's original complaint to be insisted on, if he should be so counselled, before the general court martial, and by which in point of fact they were subsequently inquired into, and completely negatived, to the credit of the commanding officer of the regiment.

This Article intended for the protection of inferior officers and soldiers, in their private and personal rights, is perverted in its design and use, when it is made the instrument or the means of indiscriminate and general attack.

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*The following decision of the general court martial, on the charge in question, may not be uninstructive.

"The court having maturely weighed and considered, as well the evi- "dence in support of the prosecution, as what has been adduced in defence, "are of opinion that the prisoner *Serjeant James Cochrane*, of the 2d bat- "talion of the 63d regiment, is guilty of the charge preferred against him;"

"The court doth therefore adjudge, that the prisoner *Serjeant James* "*Cochrane*, be reduced from his station and pay of a serjeant, to serve as a "private soldier, and further that he shall receive five hundred lashes on his "bare back with a cat-o'-nine-tails, in the usual manner."

"In justice to *Major Le Geyt*, the court feel themselves bound to remark, "that in the various instances stated by the prisoner as grievances, that of- "ficer appears to have acted towards him, only in the regular and impartial "discharge of his duty as commanding officer of the 2d battalion of the "63d regiment."

SECTION THE THIRTEENTH.

Of Stores Ammunition, &c.

THE legislature has at all times been studious, seeing with what ease frauds might be practised, and depredations committed on the public stores, to throw around them a strong guard, in the shape of severe legal penalties, to deter those, in special custody of them, from a breach of trust. Thus we find it made a felony, by the 31st *Elizabeth*, c. 4. if any person, having the charge or custody of the king's armour, ammunition, or habiliments of war; or any victual provided for victualling the king's soldiers, or mariners, shall, either for gain or to impede his Majesty's service, embezzle the same to the value of twenty shillings. The statute, 22d *Charles the Second*, takes away the benefit of clergy from the offence, but empowers the judge, after the sentence, to transport the offender for seven years. And by the 12th of his present Majesty, c. 24, to set on fire, burn, or destroy any thing of the king's arsenals, magazines, dock-yards, rope-yards, or victualling-offices, or materials thereunto belonging; or military, naval, or victualling stores, or ammunition; or causing, aiding, procuring, abetting, or assisting in such offence; shall be felony without benefit of clergy. There are other statutes, such as the 9th and 10th *William Third*, c. 41, 1st *George First*, c. 25, 9th *George*, c. 8th, and 17th *George Second*, c. 40, for the punishment of inferior embezzlements and misdemeanors with fine, and corporal punishment, and imprisonment.

These subsisting statutory declarations and provisions, directed, as they are, to be enforced through the ordinary

course of proceedings prevailing in the common law courts, having been found in practice, from the distant places and times, at which the offences may be committed, the absence frequently of the means for effectual prosecution, and the defect sometimes of a local jurisdiction, insufficient for fulfilling the purposes designed, it has been held necessary therefore to reinforce the statutory remedies, by rendering a variety of the offences, to which they relate, cognizable also by courts martial, and by strengthening the arm of such courts by extraordinary powers to give efficacy thereto.

The Mutiny Acts, since our armies have been more numerous, and more fixed in their existence, than in former seasons, calling consequently for larger and wider supplies of stores and provisions, and liable, from their magnitude and dispansion, to increased danger, from secret abuses, have furnished new clauses from time to time, as additional checks have been found to be wanting, for suppressing any newly occurrent species of offence, or any novel manner of exhibiting itself, threatening to defeat the previous enactments of the legislature: and of late years, more particularly, when British armies of unprecedented numbers, have been employed, for a series of campaigns on the continent of *Europe*, in a warfare necessarily of an expense, co-extensive with its range, unusual regard has been shewn, in the legislative Acts, to prevent malversations not only in the department of store-keepers, and of commissaries, but in the office of the paymaster, and of every other officer, in any way concerned in the receipt or distribution of the public money. The efforts of the legislature have been aided by the ordinances of the Crown, operating on the same materials, and with the same view. With the latter is our more immediate business.

The Articles, forming the present section, are for the protection of the king's stores against embezzlement, waste,

or destruction; and the public money from fraudulent conversión or other misapplication. Some of them, such as the first and fourth Article, are founded on the particular policy and authority of the Mutiny Act, and cannot well be understood or properly enforced, but by the help of the statute, to which the Articles themselves most pointedly refer.

ARTICLE 1st.—The offences, punishable on a conviction under this Article, are,

1st. The *selling* (without a proper order for that purpose), *embezzlement*, or *misapplication*, by any *commissioned officer*, *store-keeper*, or *commissary*, of the king's *provision*, *forage*, *arms*, *clothing*, *ammunition*, or other *military stores:*

2d. The *wilful* or *negligent* *suffering*, by any of the said officers, any of the *afore-mentioned stores* to be *spoiled* or *damaged.*

The offences are of affinity with one another; growing out of a breach of confidence reposed in the party intrusted.

The description of the offences in the Article is plain and obvious enough; as is also the quality of the parties that may be guilty of them.

1st. By the *selling* of the king's stores without a proper *order*, such a sale is intended, as is effected, without the authority of one competent to order, or a permission of such an extent, as may warrant the sale; in both cases, inferring, that the officer, selling, has not a power resident in himself to sell, or without the sanction of some superior.

Embezzlement imports a *pecuation*, or secret abstraction and appropriation, direct or implied, of the thing intrusted to be kept, or employed in some general or particular way.

Misapplication, *i. e.* such a *criminal* misapplication as is in the view of the Article, is not the mere allotment of a thing to another or foreign purpose, to which it was di-

rected, or ought to have been applied; for a variation, in the application of a thing from its intended object, might, in some circumstances, be even meritorious; still, however, it would be for the party departing from his instructions or directions, to justify himself in every instance for such departure. It is not such a misapplication, as might possibly be justifiable, but a *fraudulent* misapplication, having the private interest of the agent either directly or impliedly in view, that it is the purpose of the Article to provide against. This is plainly to be collected from the clause of the Mutiny Act, from which the Article originates, in which it is so expressly described.

2d. The *wilful* sufferance of the king's stores to be spoiled or damaged, carries in its front such decisive characteristics of crime, as to require no illustration.

But the suffering such stores to be deteriorated or spoiled, through neglect, is of another and less species of offence.

As *neglect* constitutes the whole of the crime under consideration, and as the term has not any definite quality annexed to it, but admits of a variety of degree, it may not be an unuseful endeavour to shew, what sort of *neglect* may be considered criminal, so as to come within the intent of the Article.

A neglect to constitute, as it is declared by this Article, a *crime*, must have more, it is apprehended, than a negative quality about it; especially as it involves, in addition, the *civil* responsibility of the party to the amount of the loss occasioned by it. A neglect, to induce these consequences, may be supposed to partake somewhat of a *positive* nature, as for instance;

In the non-observance of special instructions or general regulations in reference to the custody or disposal of the things in charge;

Or in contempt of usage and custom of office, in the dis-

charge of which the trust arises, in respect to the particular charge;

Or, when there are no instructions, regulations, or customs, to guide the officer in the custody of the matter or thing intrusted to him, in a *flagrant* and *gross* omission of care, which is usually taken, in legal intendment, as an evidence of fraud. There is the greater reason to conclude so, from the crime being put in the Article, on the same footing with respect to punishment and responsibility, with a *wilful* suffering of the object in trust to be spoiled or damnified. Any inferior degree of neglect, though implying an absence of a special and refined care, which considerate or more wary persons are in the habit of using in their own affairs, would not amount, it should seem, to that *culpable* or *criminal* negligence, so as to expose the party guilty of it to the multiplicated penalties of the Article.

If a *civil* responsibility, to the amount of the particular loss that might be occasioned by neglect, were only in the view of the Article, then the rules and well known construction in respect to *bailment*, or the delivery of Articles in express or implied trust, might be applied to the present subject with useful and beneficial effect. But as the loss of office, and other more grievous consequences, may flow from the *negligence* described by the Article, a much more liberal construction of it, in favour of the party who may be affected by it, is, in the humanity of the legal rule of interpretation, demandable.

It would be impossible, perhaps, to find any exactly parallel case, that might, from a parity of reasoning, satisfactorily explain the *degree* of neglect in a public officer. that shall amount to *crime*, unless it may present itself in the instance of the gaoler, who suffers a prisoner, accused or convicted of crime, to escape from his custody from want of due precaution. But it might not be politic or just to adopt

a rule for the government of cases, which have not all their features in common.

The *parties,* who may be guilty of the different species of offence immediately described, are *store-keepers, commissaries,* or *commissioned* officers of any other description, so that they are charged in any manner with the care of the objects within the protection of the Article.

The common *punishment,* applicable to those who may be convicted by a general court martial, of any one of the offences specified, is,

" That they shall at their own charge make good the pub-" lic loss or damage," from their embezzlement, misapplication, or neglect;

" And be dismissed from his Majesty's service;"

" And shall also suffer such other penalty as they are " liable to by the Mutiny Act."

To ascertain what the latter penalty is, relation must necessarily be had to the statute, where it will be found to be;

" *Transportation* as felons, for life, or for any certain " term of years;"

" Or *pillory, fine,* and *imprisonment,* with incapacity of " serving his Majesty in any office civil or military*"

In the clause of the Mutiny Act, on which this Article proceeds, and of which the court martial is equally bound to take notice, as well as of the Article of War, there is *first,* a more minute description of the parties on whom the legislative enactment is to operate; *secondly,* a more accurate definition of the offences embraced by the Article; *thirdly,* an extension of the objects to be protected, and of the declared crimes, which are intended to be punished; and *fourthly,* a more certain exposition of the penalties it means

* 122d clause Mutiny Act.

to inflict, and of the manner in which they are to be carried into execution.

1st. The *paymaster* is mentioned as the leading subject regarded by the 122d clause of the Act; he is spoken of for the first time in the 53d of the King.

Several officers, such as the deputy or assistant commissary, are also mentioned by name, and others generally, such as any other person employed in the *commissariat* department, "or in any manner in the care or distribution of money;" a very wide and comprehensive term.

The term "*commissioned* officer," who might, perhaps, have been considered to have some affinity in his office, with that of *storekeeper* or *commissary*, with whom he is placed in immediate contact in the Article, is rendered free, from the force of the last-mentioned clause in the Act, by the enlarged description, such commissioned officer "or other of *his Majesty's forces*," from a partial or narrowed construction.

2d. The offences set forth in the Article are not stated to be attended by a breach of trust; which is an indispensable ingredient in all of the crimes described by the Mutiny Act. The offenders, in the eye of the latter, must be either a *paymaster*, or other *commissioned officer* of his Majesty's forces, or any *storekeeper* or *commissary*, or *deputy*, or *assistant commissary, or other persons* employed in the *commissariat department*, or in *any* manner in the *care* or *distribution* of any *money*, *provisions*, *forage*, or *stores*, belonging to his *Majesty's forces*, or for their *use*: *i. e.* the officer punishable must be vested with a general or particular trust, and his offence arise, either from an act of commission or omission, out of some breach of it.

The *misapplication*, as explained by the Act, and which is alone punishable by it, is a *fraudulent* one, and which must also be supposed to be intended by the Article, as it is men-

tioned at the same time with *embezzlement*, which is undoubtedly a species of fraudulent *misapplication*.

3d. Public *money*, belonging to his Majesty's forces, or for their use, in respect to embezzlement or fraudulent misapplication is put under the same protection with, and in addition to the articles of provisions, forage, or stores, guarded by the numerous penalties, in cases of malversation, by the Articles of War.

Besides the offence of embezzlement or fraudulent misapplication by a principal, there are other offences of an accessary quality declared by the Mutiny Act; the clause enacting not only that those, who shall be guilty of *direct* embezzlement or misapplication of the public money or stores, &c., shall be subject to trial before a general court martial, and to the punishments described in the said clause; but such of those persons also, who shall *cause* to be embezzled, or *fraudulently* misapplied, or "shall *knowingly* or "*wilfully permit* or *suffer* the said money or things to be "*embezzled* or *fraudulently misapplied*," or "to be *spoiled* or "*damaged*." These newly declared offences, though some of them, but of a secondary order, are subjected, it will be seen, from public policy, to the same punishment with the original or primary offence, described by the Article.

4th. The different kinds of punishment, awardable by a general court martial, on a conviction of any offender, under the Article on the Mutiny Act, are specifically enumerated in the 122d clause, and are of two classes, of various degrees of severity and infamy; such as,

1st. Transportation, as a felon, for life, or a certain term of years; or

2d. The punishment of pillory, fine, imprisonment, dismissal from his Majesty's service, and incapacity of serving his Majesty in any office, civil or military. And such punishment may be either *accumulatively*, or in part awarded, I am

led to think, as the court martial may think fit, according to the nature and degree of the offence; though, the letter perhaps of the clause, strictly considered, would appear to sanction an accumulate, rather than a disjunctive application of the different kinds and degrees of punishment.

It cannot be said, that the meaning of the clause is so clear, as to admit not of question; but when a question is reasonably raised, it ought ever to be construed liberally and leniently for him who might suffer by an adverse construction.

Until the 53d of the King, a general court martial had a discretional power of awarding, instead of transportation, or the various secondary penalties, a forfeiture by the offender of two hundred pounds, to be summarily recovered, or in the event of his inability to discharge the same, the offender to be imprisoned for six months.

The 122d clause explains the manner in which the loss or damage, sustained by the act of the offender in any of the cases particularized, is to be made good, which is not particularized by the Article of War.

It is first to be ascertained, under the direction of the Act, by the general court martial, before whom the offender may be tried, and after it has been so ascertained, may be recovered in any of his Majesty's courts of record at *Westminster*, or in any other courts of law of competent jurisdiction, elsewhere, where the offender may happen to be resident, after the confirmation and publication of the judgement of the said general court martial. The sum to be recovered and levied to be at the disposal of his Majesty.

Other offences, described in the present section, are of a like nature with those already stated, and will be liable, in many particulars, to the same construction, which might excuse the minuteness with which I have spoken of the latter, if it should be thought, that the importance of the public and private interests involved in them did not demand

so particular a discussion. Some apology would still appear to be necessary to justify a further illustration of the foregoing offences, by cases adjudged in the military courts, to which immediate reference will be made.

The charges that have been generally instituted for embezzlement or misapplication of money or stores, have been very loosely or negligently worded, considering the magnitude of the subject, and the vast responsibility of individuals which may be implicated in them.

One remarkable case, since the alteration of the Mutiny Act, having reference to paymasters by name, is that of *Paymaster W. Maxwell*, of the *Leeds* Recruiting District, who was tried by a general court martial, at the last-mentioned place, in the month of August, 1813, on the following general charge;

"For malversation in his office of paymaster of the *Leeds* "Recruiting District, in having embezzled or misapplied, the "sum of seven thousand nine hundred and ninety-eight "pounds six shillings, or thereabouts, of the public money."

Here there is no allegation of the general duties of the paymaster, or of any money having been previously advanced or intrusted to the accused, or any grounds from which an inference might be drawn of that fact, except as it is to be deduced from the embezzlement or misapplication being charged to be in a *malversation* in his *office* of *paymaster*: nor is the money, stated to be embezzled, alleged to be money *belonging* to his Majesty's forces, or for their *use*: and, although the embezzlement of *public money*, as here charged, is in any shape a public offence, it is not such an offence, as a court-martial could take cognizance of, as I conceive, either under the Articles of War or Mutiny Act; unless such money had been stated to *belong* to his Majesty's forces or for their *use*.

The charge, however, was holden to be sufficient, and was

duly and regularly inquired into by the court, which passed after the usual recapitulation of its previous proceedings, the subsequent sentence thereon.

That the court "are of opinion that he *(W. Maxwell)* "is guilty of the charge preferred against him, being in "*breach* of the *Articles of War*, and do by *virtue* thereof, "sentence the prisoner *W. Maxwell*, Paymaster of the "*Leeds* District, to be dismissed from his Majesty's service; "and further to be imprisoned in one of his Majesty's goals, "till the sum of eight thousand two hundred and seven "pounds eleven shillings and nine pence halfpenny, or "thereabouts, which appears to be the balance due from "the prisoner to the public, shall be repaid."

His Royal Highness the Prince Regent was pleased to approve so much of the finding of the court as adjudged the prisoner *W. Maxwell* to be dismissed from his Majesty's service, and as ascertained the balance due to the public; but not to confirm the remainder of the sentence; "it ap-"pearing to His Royal Highness, that the sentence of im-"prisonment in one of his Majesty's goals, until the above "balance should be paid, was not legal; but that such ba-"lance, so ascertained by the court, might be recovered in "his Majesty's courts of record."

Though a general court martial may imprison in certain described cases of embezzlement, as in punishment of the party convicted, it is in no case so empowered as a means of enforcing restitution, or any other civil remedy.

Besides the excess in the punishment adjudged, as noticed by his Royal Highness, there is an excess in the finding of the guilt, beyond what was alleged in the charge, so far as that is to be collected from the *amount* stated to be embezzled. There is also, I apprehend, an error in pronouncing the matter charged and proved, to be in *breach* of the *Articles of War*, and the punishment awarded by the court to

be in *virtue* thereof—inasmuch as it does not appear that there is any Article in this section, or any other, bearing on the body of the specific offence. The first Article has no reference, as it has been before shewn, to *money*; but the 4th Article, though it has such reference, would not seem to apply to the person of the party convicted in this instance. He is charged to be the paymaster of a recruiting district, and in that character impeached. But the 4th Article attaches to embezzlements and misapplications, that may be committed by *commissioned officers*, who may be entrusted with monies for the *payment* of *soldiers* under their *command*, or for *enlisting* men into the king's service, or for any regimental purpose. The commissioned officers intended here are officers, in more or less military command; and not persons fulfilling a civil rather than a military office. A *district* paymaster has no soldiers under his command, nor is he officially employed in enlisting men, or intrusted with money specifically for any regimental purpose.

There can be no doubt of the competency of the court, as to the cognizance and punishment of the offence, but it is feared, that it has unnecessarily asserted its power to rest, in the present case, on a particular foundation, that is disputable at least, if not untenable.

It would seem from the manner of wording the charge, that the direct offence alleged was a *malversation* in *office*, and that embezzlement or misapplication was assigned as the species of malversation, which was to be insisted on in evidence.

The offences of embezzlement and misapplication as within the meaning of the Mutiny Act, and the 1st Article of this section, have been set forth in charges in a variety of ways, and brought under as many different legal provisions, almost, as there have been parties prosecuting them, and according to their particular notions.

In the case of *Paymaster Wm. Corbett*, of the *Wiltshire* regiment of militia, it was stated, as in the last, as "a mal-"versation in his office of paymaster, in having embezzled, "and misapplied, &c.*"

In another, as "an irregularity in the discharge of his duty as paymaster †;"

In a third, as "shameful, fraudulent, and infamous con-"duct ‡;"

And in others, simply, as "conduct unbecoming the cha-"racter of an officer and gentleman."

This practice is neither for the interest of the Crown, the public, or the accused, inasmuch as it may have a tendency to lessen the due measure of punishment, applicable to the particular case, may defeat the policy of the law, and affect the public remedy, and may at the same time perplex the defence of the accused, in neither giving him a precise idea of the crime alleged, nor of the penal consequences, that under different conclusions of the law, may attach to it. Besides a court martial will always be put to great difficulty, in framing its sentence, where the offence is defined under one legal provision, and is prosecuted and sought to be punished under another.

Now in all of the instances, above referred to, it was a matter of great facility, to reduce the offence alleged, under one or other of the heads of *embezzlement* or *misapplication*; and it is greatly to be lamented that it was not, as from the force of example, it may grow into a precedent, of a vicious and pernicious effect. If precision, to a common intent at least, be necessary in any charge, it surely should be required in a prosecution, which may expose the accused to punish-

* See proceedings of a general court martial, held at *Lancaster*, 25th January, 1813.

† *Paymaster Powers*, of the 3d regiment King's German Light Dragoons.

‡ *Morgan's* case, of the 5th *West-India* regiment.

ments, in the estimation of an honourable mind, certainly worse than death.

It may promote some useful end to advert to charges pointedly founded on the 122d clause of the Mutiny Act, which contain a very accurate description of the principal offence under consideration, and will sustain the doctrine that has been previously offered on this subject, and may, with very slight alterations, according to the circumstances of the particular case, be taken as a precedent in future. The charges, alluded to, appear to have been drawn by a skilful hand, and were preferred some time in the year 1811, against *Captain Kentzinger*, of his Majesty's 60th regiment of foot; of all which that officer was most honourably acquitted. As the general order referring to the charges may not be present to the general reader, I have inserted it in a subjoined note *.

* 1st. "That the said *Captain Charles K*———, as aforesaid, having the "local rank of major in the island of *Heligoland*, and being within the times "hereinafter stated, a person employed in the care and distribution of mo- "ney for the use of his Majesty's forces, and being stationed in the said "island for the purpose of procuring, and assisting in procuring recruits for "his Majesty's service, for which said purpose advances of money were from "time to time made to him, or to his use, by his Majesty's government; "that is to say, the sum of one hundred pounds, on or about the 26th of "June; the sum of one hundred and forty-three pounds, on or about the "24th of July; the sum of fifty pounds, forty pounds, and one hundred "pounds, on or about the 27th of July; the sum of one hundred pounds, "on or about the 18th of August; the sum of two hundred pounds, on or "about the 8th of September; the sum of two hundred pounds, on or about "the 16th of September; the sum of forty-eight pounds fifteen shillings, on "or about the 9th of October; the sums of two hundred pounds and two "hundred pounds on or about the 12th of October; the sum of two hun- "dred pounds, on or about the 19th of October; the sum of one hundred "pounds, on or about the 3d of November; the sum of three hundred "pounds, on or about the 15th of November; the sum of two hundred "pounds, on or about the 17th of December; and the sum of three hundred "and sixty-eight pounds seven shillings and sixpence, on or about the 23d of "December, all the above days being in the year 1809, did, between the

The practice of framing charges, which in substance amount to charges of *embezzlement* or *fraudulent misapplication*, so as to bring them under Articles of War distinct from the 1st Article of the present section, would appear to arise out of a supposed nicety requisite in the proof of a *direct* embezzlement or misapplication. And, it may be admitted, that, in *most cases*, it would be impossible to give absolute evidence of either offence, and in *all* extremely difficult. But it is to be recollected that both descriptions of offence are of a secret kind; and admit not often in their nature, of positive evidence, and on that account courts martial, as well as other courts, allow *presumptions*, under proper and definite rules, where positive testimony cannot be had, to supply its place.

It has been held a *constructive* embezzlement or misapplication of the king's stores in a commissary, to have meted and delivered them out by a measure, short, in its dimensions, to that fixed by the government. The embezzlement being charged, and intended by the court, from the crimi-

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"25th day of June, and the 24th day of December, in the year 1809, in the "island of *Heligoland*, embezzle and fraudulently misapply, and knowingly "and wilfully permit, and suffer to be embezzled, and fraudulently misap- "plied, the above mentioned sums of money so intrusted to his care, and "so advanced to him by his Majesty's government, for the use of his Ma- "jesty's forces or parts thereof, contrary to his duty as a person so em- "ployed, and to the great detriment, and loss of his Majesty's service.

"2d. That a further advance of money to the amount of eighty-five "pounds thirteen shillings and fourpence, being made to the said *Captain* "*Charles K.* as aforesaid, from his Majesty's government, for the above- "mentioned purposes, on or about the 8th of April, 1810, he, the said "*Captain Charles* K. as aforesaid, being so employed, did, in the island of "*Heligoland*, also embezzle and fraudulently misapply, and knowingly, and "wilfully permit and suffer to be embezzled and misapplied the last-men- "tioned sum of money so intrusted to his care, and advanced to him by his "Majesty's government, for the use of his Majesty's forces, or part thereof, "contrary to his duty as a person so employed, and to the great detriment "of his Majesty's service."

nal mind discovered in the circumstance of fraud, as to the measure.

This was adjudged on the trial of *Deputy Assistant Commissary General Fergus*, at *Martinique*, 1811, on a charge, "For having fraudulently embezzled or misapplied (within "a time specified) a certain proportion of rum and wine, "king's rations, that ought to have been delivered by him "to the garrison of *St. Pierre, Martinique*, in the legal "measures established by government, but which measures "he caused, in the course of that period, to be altered and "diminished, thereby defrauding, &c. being expressly con- "trary to the Articles of War, and good government of his "Majesty's service."

The deputy assistant commissary was dismissed the service, and rendered incapable of serving his Majesty again in any office civil or military; and ordered to make good to the soldiers the deficiencies in the issues of rations.

The being *deficient*, when called upon, in the *means* of *satisfying* the *claims* of a *regiment*, where sums for that purpose are charged and proved to have previously been in the hands of the paymaster, has been held to be sufficient evidence of misapplication *.

The military court proceeded here, somewhat on the same principle with the civil courts in the case of trover, who infer conversion from the proof of the requisition and refusal to deliver up the property when called upon, to the hands of the rightful demandant.

The being deficient in the means of satisfaction of the claims in question, was in this case made a specific part of the charge; but if it had *not*, evidence to that effect, with proof of previous advances made to the paymaster, on the same account, would have supported a general charge of misapplication.

‡ As in *Paymaster Taylor's* case, tried before a general court martial at *Hastings*, in the month of June, 1811.

Where a paymaster or a captain, intrusted with the payment of his company, charges officers or men with a specific sum, on any particular account which he has not previously paid, or does not, in reasonable time, apply to the purpose declared, has been held to be a criminal misapplication.

On a charge against *Paymaster Fillingham*, "for mis-"applying or detaining in his own hands the sum of "four hundred and forty-seven pounds, nine shillings, and "one halfpenny sterling, more or less, under *pretence* of "paying the same on account of regimental necessaries and "articles supplied to officers and men of the regiment, and "which sum or sums he regularly and monthly charged in "his abstracts, against the subsistence of officers, non-com-"missioned officers, and privates;"

Proof being adduced before a court martial, at *Trinidad*, 1812, of three hundred and one pounds, twelve shillings and two pence three farthings, of the amount mentioned in the charge, having been charged in the paymaster's abstract against the officers and men, and which had not been paid, at the date of the charge, on the account alleged, or pretended in the abstract, he was found guilty of the charge, together with another for misapplication of the subsistence money of non-commissioned officers and soldiers, and was dismissed his Majesty's service and adjudged to make good the aggregate deficiencies proved.

The refusal of payment by a captain of a company to persons, to whom money was due for necessaries and vegetables furnished to his men after he had received the full amount of his abstract, and debited his men therein for the amount of such necessaries, has, on proper proof thereof, been decided to be a criminal misapplication*.

The chief proof in both of these cases was furnished by

*Case of Captain Assiotti, of the 3d *West-India* regiment tried at Barbadoes, 1810.

the accused himself, the abstract being his own act, and operating to a discharge, as between him and those with whom he is immediately to account. It is therefore to be presumed as against him, that the sums, stated to have been paid, had actually been so, or were in the course of being so, if they could not be paid, from some intervenient cause, at the instant. At all events the amounts appropriated, and for which a credit is taken, should be always assumed to be ready, in the hands of the paymaster or other officers, to be paid over to the proper claimant, when he should appear to demand them. The keeping these sums after the demand, or for an unreasonable time *, when they might or ought to have been paid, would seem to amount to sufficient evidence of the offence under consideration.

In a charge, in substance, of misapplication, but in statement for "irregularity in the discharge of the duty of paymaster, &c. in not being able to account for considerable sums of money drawn for public and regimental services—which were specified;" a court martial has gone into a general statement of accounts between the paymaster, the War-office, and the regiment, instead of having confined itself to the strict proof of the matters alleged †.

On the trial of a charge for embezzlement or misapplication, by a captain, of the pay of some of the men of his company, evidence has been allowed to be adduced of the *general* state of the last accounts, between the captain and the men in question, in order to meet or repel the particular items of

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* The war statutes of *Henry* the *Eighth*, made it an offence in any Captayne or other charged with the payment of troops to retain it in his hands for more than six days.—And, if any obstacle occurred to prevent the payment, such captayne was bound, under the penalty of the article, to give notice of it to the treasurer of the war, before the expiration of that term.

† *Paymaster Power's* case of the 3d regiment of the king's German dragoons, tried at *Ipswich*, 1811.

alleged embezzlements set forth in the charge. In conclusion the court came to the following decision:

"In reference to the charge preferred against the prisoner, the court is of opinion, that he is *not guilty*, for it appears to the court, that the sum of money at that time (and still) due to the prisoner, on the balance account of such men, as were not actually paid by him the two days pay in question, who were transferred to another company, was sufficient to have paid the two days pay, for the 23d and 24th of January, 1811; and according to the usual custom of the service, he, the prisoner, might naturally conclude the same would have been done, the court do therefore acquit him of the charge *."

But, generally speaking, no custom, however long prevailing, or however evinced, can be permitted to contravene the positive regulation of the law. The policy of the latter, as referable to the payment of the army, is to discountenance any irregularity or delay in the payment of the troops; which by possibility might give rise to discontents, and lead to the most lamentable consequences. Besides a *particular* breach of duty can not be justified or defended on the merits of the party in the *general* discharge thereof, for the nature of the original act cannot be altered by any thing contingent, whether it happen anteriorly or subsequently, but must rest on its own principle, be it good or bad at the time.

The preceding observation would seem to be sustained by the decision of the general court martial in the case of *Paymaster William Cockell;* who was tried at *Lancaster*, in 1813, on several charges of embezzlement and misapplication.

The principal embezzlements were alleged to have taken place between the 24th of June, 1811, and the 20th April, 1812; and evidence was offered on the behalf

* *Captain Meredith's* case, of the 85th regiment, tried at a court martial, held at *Hythe*, in February, 1812.

of the prisoner to shew, that up to a certain date, within the inclusive time specified, that a large balance was due to him; to cut down which some counter evidence was exhibited on the behalf of the prosecution. The court martial, ultimately, in delivering their sentence, came to the following conclusion:—

"The court martial also find, that on, and up to the "24th December, 1811, there appears to have been "entered, upon the regimental books, balances due to "the prisoner from certain companies, amounting to six "hundred and thirty-one pounds, eleven shillings, and nine "pence, against which sum claimed by him, a set off has "been subsequently made for money, stated to have been "received by him (exclusive of the sums in the present "charges) upon the regimental account, and not to have "been issued or accounted for since."

"The court would not consider themselves justified in "giving credit upon their proceedings to the prisoner for "such balances, because the sums of public money, which "he had overdrawn and retained, ought to have been appro-"priated to other specific purposes, and because the claims "set against them would involve the necessity of an opinion "upon a subject not coming within the charges now sub-"mitted to their judgment, and for which they have not "been furnished with the necessary evidence."

A court martial is not a court constituted for the purpose of unravelling the accounts of parties opposed in interest to each other, but to try whether particular offences, charged, have or have not been committed.

The Mutiny Act contains a particular clause against the improper retention of the soldiers' pay by paymasters or others; which may serve in some sort as a guidance to a court martial, in their construction of what may be considered a misapplication of money so far as relates to pay.

The clause in question enacts.

"That if any *paymaster, agent*, or *clerk*, of any garrison, regiment, troop or company, shall *unlawfully detain*, or withhold for the space of *one* month, the pay of any officer or soldier (clothes and all other just allowances being deducted), after such pay shall be by him or them received; or if *any* officers having received their soldiers' pay, shall refuse to pay each non-commissioned officer and soldier their respective pay when it shall become due, according to the several rates established by his Majesty's orders, then upon proof thereof before a court martial as aforesaid, to be for that purpose duly held and summoned, every such paymaster, agent, clerk, or officer, so offending, shall be discharged from his employment, and shall forfeit to the informer, upon conviction before the said court, one hundred pounds *."

That the offence, when committed, may be the more frequently detected, the informer, if a soldier (and if he demand it), is to be *ipso facto* discharged from the service, on the conviction of the offender.

It is to be remarked, that an officer having the pay of his men actually in his hands, on a demand and refusal to pay the same, when it shall have become due, to the non-commissioned officers or soldiers entitled to it, is liable on conviction thereof, to be discharged from his employment. It is otherwise with paymasters, agents, or clerks; who are not punishable in the same case by discharge, &c., until the lapse of one month, from the time of the receipt of the pay. This time is granted, probably, for the purpose of enabling the latter to balance their accounts, and make the lawful deductions to be set against the pay, and from the consideration of their having more multifarious accounts to settle than ordinary officers possibly can have.

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* 126th clause Mutiny Act.

Other clauses in the Mutiny Act, which it may not be impertinent to notice, have relation to this object; and convey directions, for the regulation of it, under suitable penalties against the non-observance of them, in many important points.

"For enforcing a prompt observance (says the 127th clause) of the rules and orders established or to be established for the due appropriation of the public funds, applicable to army services, and that a true and regular account may be kept and rendered by the agents of the several garrisons, regiments, and independent troops and companies, the said agents are hereby required and directed to observe such orders and directions, as shall from time to time be given by his Majesty under his sign manual, or by the secretary at war for the time being, by his Majesty's commands, or by his Majesty's chief governor or governors of *Ireland*, or by the lord treasurer or commissioners of the treasury for the time being; and if any agent shall refuse, or neglect to observe and comply with such orders and directions, he shall for the *first* offence forfeit the sum of one hundred pounds, to be recovered by action of debt or information for the use of his Majesty; and for the *second* offence to be discharged from his employment as agent of the garrison, regiment, battalion, independent troop or company, in relation to which he shall have been guilty of such offence, and be utterly disabled to have or hold such employment thereafter."

The 129th clause of the Mutiny Act, in effect, enacts, that the paymaster, agent, or clerk, of any garrison, regiment, troop, or company, liable to account with the executors and administrators of such officers or soldiers, for pay received by him or them, on account of such officers or soldiers, shall, on seasonable demand of the executor or administra-

tor, and at the expense of the demandant, deliver a just and true account of such sum or sums received on account of such officers or soldiers, and for which such paymaster or other are accountable, and shall account with such executor or administrator for the same; or offending therein, shall forfeit the like penalties, to be recovered in the like manner as appointed by the Mutiny Act, for such colonels or agents not giving the due account of, or for the pay of the said officers or soldiers to and for such officers and soldiers themselves.

A general order of the *Duke* of *Cumberland*, in 1745, established a very just and useful regulation, in respect to the payment of the troops under his Royal Highness's command, and which is worthy of attention at the present day. It ran to the following effect:—

" No paymaster to pay the troops in any other coin, but
" that they receive from the paymaster-general, under the
" penalty of *making up* the *deficiencies*, and of being *ca-*
" *shiered* for it; and the commanding officers of corps are to
" be answerable that this order is obeyed*.

ARTICLE 2d.—This Article relates to minor offences, which may be committed by non-commissioned officers or soldiers, in the conversion to their private purposes, or destruction of the ammunition intended for the public service, subjecting them, on conviction before a general court martial of having *sold*, or *designedly*, or through *neglect*, wasted the ammunition delivered out to them, to corporal punishment or imprisonment at the discretion of the court; non-commissioned officers, so offending, to be also reduced to private sentinels.

The *neglect*, intended here, is liable to the same construction with the negligence treated of in the preceding Article.

ARTICLE 3d.—Horses, arms, clothes, accoutrements,

* From a series of orders—published by *N. Conant*, 1777.

and regimental necessaries, are protected by this Article with the same care as ammunition in the preceding one. Any non-commissioned officer or soldier, who shall be convicted by a general court martial, of having sold, *lost*, designedly or through neglect spoiled any of these Articles, is made liable to a weekly stoppage (not exceeding the half of his pay), as such court martial shall judge sufficient for repairing the loss or damage; and to suffer, besides, corporal punishment or imprisonment, at the discretion of the court martial.

ARTICLE 4th.—The leading Article of this Section more especially regards persons, vested with a continued or general trust, such as paymasters, store-keepers, &c.; whereas the present relates only to those, who may be charged with a particular or occasional one; enforcing the conscientious fulfilment of it by severe and additional penalties. Though the offence in this place be substantively considered, it yet ranks with those described in the first Article.

It is enjoined by the 4th Article, that "if any *commissioned* "*officer* shall *embezzle* or *misapply* any *monies*, with *which* he "may have been *intrusted* for the *payment* of the *soldiers* "under his *command*, or for *enlisting* them into the king's "service, or for any *regimental purpose*, and shall be con- "victed thereof by a general court martial, he shall be dis- "missed the service, and shall forfeit the arrears due to him "on account of his pay, or so much as may be sufficient to "make good the deficiency occasioned by such embezzlement "or misapplication; and shall also suffer such other penalty "or imprisonment as he is liable to by the Mutiny Act." The additional penalty has already been noticed and explained, in speaking of the first Article.

Warrant officers, on conviction of the offence described in this Article before a general or *detachment* court martial, to

which latter tribunal they are made amenable by a special Article of War, are rendered liable to the same penalties with commissioned officers. But in case such warrant officers shall have been originally enlisted as private soldiers, and shall have continued in the service until their appointment to be officers by warrant, they are liable, at the discretion of such general or detachment court martial, to be dismissed the king's service, or to be reduced to serve either in the capacity of non-commissioned officers or private soldiers, and to be put under stoppages until the money embezzled or misapplied by them shall have been made good.

The distinction drawn between the two descriptions of warrant officers arises out of the circumstance, that the first generally purchase their station, the second obtain it by service or favour. Besides the first, never having but one rank and station in the king's forces, when they are dismissed from *that*, are virtually excluded from the army; but the second, being constituent parts of the army, when admitted to the rank of warrant officers, fall, not unnaturally, when dismissed from office, within the ranks from which they were promoted. The latter have so far the original character of soldier impressed on them, that they may, without any apparent violence, if it suit the policy of the State, be retained as such.

ARTICLE 5th.—This subjects non-commissioned officers, convicted at a general or regimental court martial, of the like offence specified in the preceding Article, to be reduced to serve in the ranks as private soldiers, to be put under stoppages until the money be made good, and to suffer such corporal punishment or imprisonment as the court martial shall think fit.

This Article is formed on the 123d clause of the Mutiny

Act; which exempts virtually, if not expressly, non-commissioned officers from the heavier penalties, denounced against commissioned officers by the 122d clause, on the ground probably of the former having in general less education, and consequently not so correct notions of their duty, as the latter must be understood to have.

If non-commissioned officers are not included in the general words of the 122d clause, " or *other* person employed in the commissariat department, or in any manner in the *care* and *distribution* of any money," so as to make them liable to other severer penalties; neither are warrant-officers, as it would appear, included therein for the like purpose.

ARTICLE 6th is regulatory, or perhaps more declaratory than regulatory, stating that every captain of a troop or company, is charged with the arms, accoutrements, ammunition, clothing, or other warlike stores, belonging to the troop or company under his command, for which he is to be accountable to his colonel, in the event of their being lost, spoiled, or damaged, not by *unavoidable* accident, or on *actual* service.

By *unavoidable* is intended, what could not have been prevented by common and ordinary prudence, and *not* what might have been avoided by *possible* or *extraordinary* exertions.

The responsibility of the officers, in immediate charge of the articles in question, is not a naked one, as they are allowed, by long established regulations, an half-yearly contingent allowance on that account.

SECTION THE FOURTEENTH.

Of Duties in Quarters, in Garrison, or in the Field.

A congeries of regulations, referable to a large and independent body of crime, is declared under this Section. The substantive offences described are to be recognised for the most part under the usages and customs of war, and the regulations or ordinances of the Crown; though some of them are distinguishable under the enactment and direct sanction of the legislature.

ARTICLE 1st.—It is at all times most desirable that an army whilst marching through a foreign territory, and much more through its own country, or that of an ally, should conciliate the people, by its peaceable demeanor, and render the progress through it as little inconvenient or prejudicial to the common inhabitants as may be. The same is also to be desired of its conduct during its temporary sojournment in quarters or in garrison.

From a full impression of the resulting benefits to the affairs of an army from the observance of an orderly behaviour, and respect to the civil orders of society, different rules have been made, by successive military authorities, and have been carried into effect with a constant and steady attention, for securing the quiet and orderly march of the troops, and for restraining, through the means of proper penalties, the licentiousness and excesses of the soldiery.

In a compilation of rules, drawn up by an eminent civilian, in the time of *Queen Elizabeth*, it is declared—

"When a company of souldiers shall be lodged in any "village, or passe through it, or by any dwelling-house, or

"other belonging to our friends, they shall *not* hurt, *nor* "injure the people in their persons nor goods, upon *paine* of "death, or other grievous punishment, according to the qua-"litie of their offence."

Not only the destruction or injury of private property by the troops, such as pulling down dwelling-houses or setting them on fire, and the hewing down of trees, was stated to be a grave offence, in the war ordinances of the time of *Charles* the *First*, but the *defacing* also of the *beauty* of *nature*, in which all men have a common interest and delight, though it be not accompanied with that possession by which property in any individual be inferred or denoted.

If it be thus necessary to enforce order and respect for property, in the loose and unsparing season of war (to which time these ordinances appear to have been adapted), it is of infinite more consequence to require an attention to them in peaceable seasons; to which the Article under consideration more particularly applies.

This Article is formed principally on the 21st Article of the rules for the government of the land forces of *James* the *Second* then in pay; having all the specified objects, or nearly the same, under protection, and awarding a like punishment to the injury or violation of them.

After reasserting the principle stated in the 5th Article of the ninth section, "that all officers, non-commissioned of-"ficers, and soldiers, are to behave themselves orderly in "quarters and on their march;" this Article proceeds to lay down a rule for the punishment of particular offences in direct repugnance to the order and regulation enjoined, ordaining that—

"Whoever shall commit any waste or spoil, either in "walks of trees, parks, warrens, fish-ponds, houses or "gardens, corn-fields, enclosures or meadows, or shall ma-"liciously destroy any property whatsoever belonging to

" any of the king's subjects, he or they who shall be found " guilty of offending therein, shall (besides such penalties " as they are liable to by law) be punished according to the " nature and degree of the offence, by the judgment of a " general or regimental court martial."

In respect to the destruction of general property there is an exception in favour of those who may destroy it by the *order* of the then commander in chief of his Majesty's forces, " to annoy rebels, or other enemies in arms against the " King," *i. e.* during the period of civil or public war. At another season, one could not anticipate orders to that effect from any officer in so high a trust; nor, if he should unadvisedly issue them, could he complain, if they should not be promptly executed.

Some of the offences enumerated in the Article are statutory felonies, such as the spoiling of any fish-pond whereby the fish may be lost or destroyed, the cutting down or destroying any trees planted in an avenue, or growing in a garden, orchard, or plantation, robbing of a warren; the stealing or taking any fish in any water within a park, garden, orchard, or yard; or burning or destroying any fences for enclosures pursuant to act of parliament.

The Act, it will be observed, makes a difference between trees generally, and those planted in an avenue, or growing in a garden, &c. for *ornament*, *shelter*, or *profit*. And the Article in question favours the same distinction referring only to the trees in *walks*.

Fruit trees * are specified in the Articles of the *Earl* of *Northumberland* in the time of *Charles* the *First*.

Of what may be considered, waste or spoil in *corn-fields*,

* The 4th Article, for the government of the King's army, under the general head of " Duty in *marching*" runs thus:—

" No soldier shall presume in *marching* or *lodging*, to cut down any *fruit* " trees, or to deface or spoil *walks* of trees upon pain of severe punishment."

the 21st Article of *James* the *Second*, may afford some explanation. It may consist, as it is there put, "in *treading* down, or *otherwise* destroying the *standing corn* in the *ear*."

And the offence *as to meadows*, may be assumed, as declared in the last-mentioned Article, "from putting horses *therein*, without *leave* of the superior officer."

The punishment, ordained by this Article for the different offenders that may be convicted under it, is in addition, as it may be seen, to the penalties, they are liable to by *law*; that is such, I conceive, as may be in the nature of damages for the wrong or injury done. For in other cases, where the offences, in the contemplation of the Article, have been previously proceeded against by prosecution in the civil courts, it might not be competent for a court martial to inquire into the same, otherwise than to the intent of cashiering the parties offending *.

ARTICLE 2d.—This ordains, that all non-commissioned officers and soldiers, who shall be found one mile from the camp, without leave in *writing* from their commanding officer, shall suffer punishment at the discretion of a general or regimental court martial.

This has been an express military regulation since the time of *Charles* the *First*, but enforced then with a much heavier punishment than at present; namely, with *death*.

A mile is mentioned as a convenient space, probably, for all the pusposes of exercise and refreshment; for within which circumference about a camp are usually to be found all the necessaries with which a soldier may have to supply himself. On some occasions within the last-mentioned reign, the distance was narrowed to half a mile †. But though this is the prescribed limit, beyond which soldiers cannot pass without particular permission, it does not follow

* See the 18th clause Mutiny Act.

† *Whitelock's* Memorials, p. 465.

that they may not be guilty of a military offenee, being found at a less distance from the camp than the point described in the Article; since it is clear that no one has a right at any time to leave his place, or the ordinarily fixed bounds, without leave from his officer. But even leave from an officer will not be sufficient to save the party from the peril of this Article, unless it be in *writing*.

The policy of the Article is very obvious; being to prevent soldiers from the abuse of a limited leave, which might often afford a facile mean of *desertion*, or an opportunity of marauding or plundering the circumjacent inhabitants, and thereby occasion a much greater loss to the ranks of the army, from their liability to be wounded or killed in their unlawful practices, than by the immediate cause first noticed.

It is mentioned in a treatise of some authority on *military discipline*; that "all parties are to have a *passport* or *order* in "writing, signed by the governor or commandant of the garrison, and sealed with his coat of arms, in failure of which, "shouldthey be taken, they would not be treated like *prisoners* "of *war*, but left to the discretion of the enemy, and the governor, to whom they belonged, has no right to claim "them."

"If a party under nineteen men are taken, and have not "a pass under the governor's hand and seal, that there were "*so many* detached, they will be treated as above mentioned, "and condemned by a court martial, either to the *gallies* "for *life*, or a punishment equally as bad."

"The custom, I presume*, is only to prevent a smaller "number from being detached, who can only be sent to "pilfer and steal, which is looked upon by all sides as an "ungenerous way of making war."

The force of this observation is increased, in application to licences, granted to individuals.

* Bland, p. 186.

ARTICLE 3d.—This and the following Article proceeds on the same principle with the latter. They are both governed by an evident preventive policy, to obviate the evils already mentioned, with many others that might be committed in the darkness of night, to which a general allowance for sleeping out of camp at will, or on a slight pretext, would furnish an opportunity as well as cover; to the injury of the civil neighbourhood, and the corruption of the morals and discipline of the camp.

If *officers*, to whom this Articles attaches as well as the private soldiery, might be supposed from the circumstance of better education, superior to *some* of the temptations, that are apt to seduce the common subjects of the army from the path of duty, they might be expected from the same reason, or from nicer sensibility excited by a refined education, to fall more easily into *others*, of which the lower order, from a variety of causes, are not so much in danger. Where it is necessary, however, to frame general rules on a general policy, none can be excepted, on peculiar pretensions, from their operation. Or it would happen, here, that the *conduct* of the officer might stimulate as an *example* when it could not be admitted as an *excuse*. Hence both are included in the same regulation, which ordains " that none " shall lie out of his quarters, garrison, or camp, without " leave from his superior officer" on pain of being punished according to the degree of the offence, by the sentence of a general or regimental court martial.

An ordinance to this effect is to be found in almost every military code, ancient or modern, which would seem to bespeak its use.

The necessity of previous permission to abide for the night *without* the camp or garrison, allows a choice to the officer to grant it or not, according to the *character* of the party requesting it, and a discretion as to the *numbers* to whom it

may be granted, so that it may not in any case conduce to public inconvenience or injury, by improper persons or unreasonable numbers being absent from their stations; and thus to leave the camp or garrison not suitably protected. It is quaintly but judiciously observed, "While men lodge *out* of "order, it is hard to bring them in the night *into* any order. "Besides this inconvenience, while soldiers lodge out of "their quarters, the same falleth out to be unfurnished often-"times, if the enemy should then chance to assault it; and "*espials* cannot be *discovered*, nor the *dangers* of *secret* meet-"ings *avoided* *."

ARTICLE 4th.—This, like the last, is more a police regulation, than an ordinary law.—It requires "that non-"commissioned officers and soldiers shall retire to their "quarters or tents, at the beating of the retreat;" *i. e.* at a given and reasonable hour at night.

The penalty, on non-compliance with this injunction, is the same as in the preceding case †.

The Article is calculated to secure the regular and orderly return of men to the posts, wherein they are or ought to be

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* By the Articles of War, temp. *James* the *Second*, Article 27th, "No "officer shall lie out all night from the camp or garrison without his superior "officer's leave, upon pain of being punished for it as a court martial shall "think fit; nor shall any soldier or officer go any by-way to the camp, or "other than the *common* way laid out for all, upon pain of being punished "as aforesaid." The latter part of the regulation, is not only to prevent the clandestine return of persons to camp and garrison, inferred thereby to have gone forth for unlawful purposes; but to render the approach of the enemy's scouts, who would naturally go by secret paths, more easily discernible. The Article has an aspect to the state of war.

† The offence was summarily punished in the time of *James* the *Second*, among whose Articles of War is the following:—

"When the warning is given for setting the watch, by *beat* of *drum*, or "sound of *trumpet*, if any soldier shall absent himself without reasonable "cause, he shall be punished by *riding* the *wooden horse*, or otherwise, at "the *discretion* of the *commander*." 30th Article.

found for the night, thus keeping the forces together, to act on any emergent occasion. It affords an opportunity for numbering the soldiers, if need require it, to see that all be present in their places, or to detect unlicensed or faulty absentees. It furnishes often the means, with other concurrent circumstances, of discovering the perpetrators of crimes, who are unable to give any reasonable account of themselves, during the period which they have been absent; and sometimes leads, with the help of parties sent out for the purpose of apprehending stragglers, to the restraining or surprising of offenders in the very act or commission of crime.

In time of service in an enemy's country, it is known, from experience, to have an useful effect, preventing confusion, which would otherwise be occasioned by the intermingling of the enemy's spies with the stragglers of our own army. It is said by the learned writer just referred to, and in his own pithy way, "that the wandering up and down of "soldiers and others after that time (meaning night), doth "cover spies; which, if every man resort to his quarters, "cannot long lie hidden."

The return of troops to their quarters at a reasonable time has another advantage, not of less importance than those already noticed. It gives an habit of retirement to rest at an early hour, inducing to the refreshment and health of the soldiery.

The ancient rules of war were particularly strict in their ordinances for securing the quiet and peace of the camp or garrison.

Thus in *Sutcliffe's* compilation, it is ordered—

"All manner of persons within the camp or garrison, "after the *watch* is *set*, shall *repair* to their *quarter*, and "there use *silence*, that every man may rest. All *stragglers* "and *tumultuous* persons, that are taken *abroad*, after *that*

" time, shall be *committed* to *prison*, and there abide until " their cause be examined by the officers of justice, and " order taken for their punishment or dismissing."

And also in the general orders issued by the *Duke* of *Cumberland*, in the year 1745.

" The grand guard to patrole, and take up all men strolling beyond the grand guard, and carry them prisoners to " their regiments, a court martial to be held immediately at " the head of the colours or standards, and the punishment " adjudged to be immediately inflicted *."

This summary mode of executing sentences, making the punishment follow fresh on the heels of the offence, must always have a salutary effect, in associating, and rendering as it were inseparable, the ideas of guilt and of atonement.

ARTICLE 5th.—The duties of officers and soldiers, in respect to their regular attendance, at the place of parade, of exercise, or appointed rendezvous; and their continuance thereat, or on any guard, wherever they may be set, are particularly enforced by this Article; rendering a failure by any one to repair at the time fixed, to the place or places appointed, unless he should be prevented by sickness or evident necessity, punishable by the judgment of a general or regimental court martial, according to the degree of the offence: and, subjecting to the like punishment and after the same judgment, the absence or departure of any person, without *leave* from his commanding officer, from the place of rendezvous, or from his guard, before he shall be regularly dismissed or relieved.

The circumstances that are to account for the absence of the party in the first case, namely, of sickness or some other evident necessity, the absentee will in all circumstances be

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* From " the Rudiments of War, comprising the principles of military " duty, in a series of orders, issued by commanders in the English army."— Printed by *N. Conant*, 1777.

obliged to shew, to the satisfaction of the commanding officer, for otherwise this will not afford an excuse, either by the certificate or report of the surgeon, or by other required or reasonable evidence. In the latter case nothing will serve as a defence, but the absolute *leave* of the commanding officer. The person alone, competent to grant the requisite *leave*, would appear to be the officer who originally appoints the guard; so is it to be inferred from what is observed in the old Articles of War, in relation to the subject.

Absence from guard, without leave, in time of war, was reckoned among the number of capital offences in the war statutes of *Henry* the *Fifth*. These vindicate the severity of the law, in this particular, by shewing the reason on which it acts.—

"Whereas disturbances frequently happen in our army "(say the last-mentioned statutes), as well by day as by "night, which by daily and diligent watches, and proper "guards, are prevented; wherefore we ordain, that our "mareschall shall appoint a daily guard, portioned to the "number of armed men of which our army shall consist; "and every captain shall in turn assist in performing the "said watches and guards. Nor shall any captain either "of horse or foot, being as is premised, duly warned and "ordered for guard, dare to be deficient in the number of "men of arms, or archers, or to quit the said *guard* or "watch in any manner, till the *limited* time, without the "*special* licence of him, by *whom* the said *guard* was *ap-* "*pointed*, on pain of *decapitation*."

In the statutes of *Henry* the *Eighth*, the offence is treated with some abatement of the rigour of the preceding ordinance, though seemingly with severity enough, the offender's body being thereby liable "to be imprisoned, and his person "and goods to stande at the king's pleasure."

The 4th Article, now under consideration, appears to have been intended for the interval of peace, rather than of war; but authorizing as it does, a discretional punishment, according to the quality of the offence, with reference to the circumstances under which it may be committed, may be adapted by such latitude to the exigencies of the latter period.

ARTICLE 6th.—This and the Article immediately following, were framed for the purpose of obviating an abuse which had for some time previously prevailed, and in a very notorious degree, among soldiers quartered in the metropolis, or its vicinity, who, being able to find there constant and more profitable employment than in the military service of the country, in work or labour on the Thames, or in the numerous yards and wharfs upon its banks, engaged their comrades to undertake, for a certain proportion of pay, the particular routine of military duty which they would otherwise be obliged to perform; a practice tolerated, if not favoured, from a custom, or supposed custom obtaining, and said to be attended with a certain profit, from deductions out of the absentee's pay or profits, by the commanding officers of such soldiers. Such a practice, tending as it manifestly does, to weaken the very foundation of military discipline, by rendering one half of every corps, after a certain absence, imperfect or inefficient in their military duties, and the other, less careful or mindful of them, from an increased enjoyment of pay, beyond their necessary wants, and those sober and frugal habits, so indispensable, in observance, to the well-being of the army; and encouraging officers, to whom pecuniary gains, though openly and honourably acquired, should ever be a secondary object, to look to other profits or remunerations, than the ostensible stipends which the king has thought proper to assign to them; such a practice, it need scarcely be added, when once brought under

the eye of the supreme authority, could not be expected to pass without correction. Hence arose the present Article, which enjoins, that no soldier of any description, "shall "hire another to do his duty *for* him, or be excused from "duty, but in case of *sickness*, *disability*, or *leave* of *ab-* "*sence*, under penalty, on violation of the injunction, that "the party *hiring*, and the party *hired*, shall be punished, "on conviction, at the discretion of a regimental court "martial."

ARTICLE 7th.—Every *non*-commissioned officer, *conniving* at the *hiring* of duty, as described in the preceding Article, is rendered by the present liable to be *reduced* for it: and every *commissioned* officer, knowing and allowing of such evil practices, to be punished by the judgment of a general court martial; the only regulation wanting to promote the grand end in view.

ARTICLE 8th.—This Article has in its immediate view the enforcement of the principle, that all military bodies, of whatever numbers they may consist, be they more or less, should, to make them efficient, be kept united, and not suffered to be separated or diminished, but in extreme cases, or by the permission or knowledge of the superior in command over them.

The 4th Article of this Section having provided a remedy against the failure of officers or men in repairing to the rendezvous, or their departure from it or their guards without authority; it required a further regulation, applicable to the condition of soldiers, in a state of array or of motion, to make the arrangement complete; and this is furnished by the present Article. It ordains, that if any *officer*, *non*-commissioned officer, or soldier, quit his *platoon* or division, without *urgent* necessity, or *leave* of his superior officer, shall be punished, according to the quality of his offences, by the judgment of a general or regimental court martial.

Platoon would seem synonimous with *company*.

If this happened in time of actual service, it was formerly visited with extreme punishment.

Thus in the Articles of the reign of *Elizabeth*——" All " souldiers that wilfully absent themselves without *lawful* " causes, from their colours, or *companie*, that goeth to " charge, or resist the enemie, deserve *death*."

Such offence, if prosecuted under another Article, of which there will be occasion to speak hereafter, might, under aggravated circumstances, possibly entail on the offender the like punishment at the present day.

ARTICLE 9th.—This Article is directed against *drunkenness;* a most pernicious vice in any one, but more particularly in a soldier. It ordains that, whatsoever *commissioned* officer be found drunk on his guard, party, or other duty, under arms, shall, upon being convicted thereof before a general court martial, be *cashiered* for it: any *non*-commissioned officer or soldier, so offending, shall suffer such *corporal* punishment or imprisonment as by a general or regimental court martial may be awarded."

The penalties declared by the Article attach not to drunkenness *per se*, but as it may be connected with the discharge of some important duty at the time, for the due execution of which, it is supposed to render the party affected by it not only unfit, but a dangerous instrument to all around him. In this regard the punishment of *cashiering*, awardable to an officer, even for a single or casual offence of this sort, does not seem severe; in as much as it is impossible to conjecture the sum of mischief that might be effected, by a guard or party, to themselves or others, whilst left to act, for ever so short a period, under the guidance or orders of a drunken commander.

It is to be noticed, that this heavy penalty is not at all events adjudicable, without the power of mitigation in the

breast of the court martial, except in the instances specified, when the officer shall be found offending on his *guard*, *party*, or *other* duty, "under *arms*." It is the last circumstance that increases the degree of the offence. This too must be taken to be the main ingredient in the crime of the non-commissioned officer and soldier, and the principal consideration in the punishment that may be awarded to him under the letter of this Article.

The offence was in this light considered by the Articles of War of *Charles* the *First*; wherein it is ordered, that, "what officer soever shall come drunk to his guard, or shall "quarrel in the quarter, or commit any disorder, shall be "cashiered without mercy." And to lead to the detection of so dangerous a crime, it was added, as I have remarked in another place, to the above Article;—

"And the *next* officer under him, shall have his *place*, "which he may *pretend* to as *his right*, and it shall *not* be "refused to him."

It is not to be understood, that *drunkenness* of *itself*, is not a crime in the contemplation of the law martial. On the contrary it has always been held a more heinous offence in the military than in the civil code. The latter has not, I believe, yet proceeded to punish it further than by *fine**, or, in the event of the party not being able to discharge it, the sitting six hours in the stocks; by which time the statute presumes, as a learned author says, the offender will have regained his senses, and not be liable to do mischief to his neighbours. The more immediate correction of this offence, is left by the ordinary law to other than human hands, as the like offence consists more immediately in the abuse of the best faculties, given to man by his Maker, temporarily disqualifying himself for the fulfilment of those higher and nobler

* Vide stat. *James* the *First*, c. 5.

purposes, for which he was designed, and lowering him, while it exists, even below the brute creation.

But though the ordinary law does not deal more severely by drunkenness, it shews it not any favour, when it is discovered to be attended by crime; regarding it in that case but as an aggravation of every criminal act or behaviour. The law of *England*, says *Blackstone*, seeing how easy it is to *counterfeit* this excuse, and how weak an excuse it is (though *real*), will not suffer any man thus to privilege *one* crime by *another*.

Though wishing not to dwell on the immorality of the offence or on the estimation in which it has been holden, at all times, and in all societies; it may still be seasonable to consider it somewhat more at large, as it may bear on the military state and its concerns, or as it has been viewed by the military law. This perhaps could not be more usefully and certainly not more briefly shewn than in the words of an authority I have before quoted.

" The voyage of *Portugal* taught us (says the learned " civilian and judge-advocate) the inconvenience of drunk- " ennesse by experience, but yet reason teaches us much " more. Thereof proceed *quarrels, mutinies*, and many " other *disorders.* Drunken men are unfit to *marche*, to " *watche*, to *fighte;* or to do *any manner* of service: too " common it is notwithstanding among common soldiers, " and, I would to God that captains and officers of com- " panies were free from it. In *whomsoever* it is, the same " may not be passed without punishment: wherein that " neither sober men be touched wrongfully, nor drunkards " escape scandalously."

Every officer, in the charge of men, could add, to the list of the direct effects of the vice above specified, several subordinate and collateral ills, such as the sale by soldiers of their own, and the stealing of their comrades' necessaries, for

the purpose of converting them into the means of purchasing and indulging in strong liquors, a practice equally destructive of the discipline and the order and economy of the camp.

For the pernicious tendency of the practice, it was enjoined in the military code of the time of *Elizabeth*, "that "*drunkards* should be *imprisoned*, and fed with *bread* and "*water* so long as the qualitie of the offence should deserve:" and this, whether it were attended by any outrageous act or not.

At a later period, an instance is mentioned of a *Captain Lieutenant*, having been cashiered, by the sentence of a court martial, at the *head* of his regiment; no slight disgrace! for this single offence*.

At all times when any substantive crime has been found to be combined with drunkenness, it has been punished with additional rigour.

A soldier for drawing his sword in a *drunken* mood, quarrelling and abusing some town's people, was by a court martial sentenced to stand an hour in the market-place of *Plymouth*, to run the gauntelope twice through four companies, to have his sword broken over his head, and to be cashiered†.

Another was ordered about the same time to run the gauntelope for drunkenness, and being found in bed with a woman not his wife‡.

It is to be observed that these very severe inflictions were ordered, in the extraordinary and strict times of the commonwealth, but still they appear to have been conformable to the rules and customs of war obtaining at the season.

We are, however, not without examples of noticeable penalties awarded against this offence, within our own days; when it has been attended with other misbehaviour, or pecu-

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* *Whitelocke*, p. 465. † *Whitelocke*, p. 462. ‡ *Whitelocke*, p. 486.

liar circumstances of indecorum, or has been frequently repeated.

An officer has been sentenced to be cashiered, for that he got drunk, on an evening named in the charge, and of the day upon which the company he belonged to disembarked, and " for having thereby incapacitated himself from exert-" ing that vigilance, and attention towards the men, which " his duty as a subaltern officer required; for having on the " contrary afforded to the soldiery a shameful example of " that irregularity which they had been forcibly enjoined to " avoid;" and for other misbehaviour of the same evening, and under the same influence, specified in a second charge*.

In another instance, for appearing at the church parade of the regiment on a Sunday named, in a state of intoxication, and for being drunk when on the duty of orderly subaltern of the same day, having been named in regimental orders for the said duty the day before †.

Again, for absenting himself without leave, at which time he was so intoxicated as to be incapable of proceeding with the detachment ‡.

And for being repeatedly drunk when on duty, and going into the soldiers' barracks at different times, eating and drinking with the men, especially on a day mentioned, when he was orderly officer of the day §.

None of these cases would seem to fall exactly within the letter of the 9th Article, though they are all undoubtedly included in its spirit, for they discover the offence provided

* *Lieut. A. Robertson's* case, of the 35th regiment of foot, published in G. O. 13th August, 1810.

† *Lieut. J. M'Quarrie's* case, 1st Battalion 63d regiment, G. O. 24th April, 1813.

‡ *Ensign J. F. Gunter's* case, Canadian Fencibles, G. O. 22d April, 1813.

§ *Lieut. H. Maxwell's* case, 8th *West-India* regiment, G. O. 29th November, 1811.

against by the Article, closely allied with circumstances which, if they threaten not so immediate an injury to the military state, as acts connected with the duties of officers under arms, might in their consequences not less materially affect it, through the corruptive influence and danger of example, if not repressed and restrained by a strong coercive and corrective hand.

Drunkenness is never to be detected, nor can become a fit object of punishment, except where it is evidenced in some outward act; and will be then punishable, according to the tendency of the act to interfere with the public service or public morals—but in no instance should it be allowed to pass unreprehended, for the sake of the reformation of the individual, if not for the benefit of the military society, which can never be deemed in a state of such security as to dispense for a time with the active services, if they should chance to be required, of the humblest of its members. And it is happy, under the present Article, that there is a discretion resident in courts martial, save in the extreme cases noticed, to apportion the punishment to the circumstances of the offence.

ARTICLE 10th.—This ordinance relates to offences which have ever been considered of an aggravated kind, and punished with the highest penalty, which the law can inflict.—It ordains, that " whatever sentinel shall be found " sleeping on his post, or shall leave it before he shall be " regularly relieved, shall suffer *death*, or such other punish- " ment as by a general court martial shall be awarded."

The Article is framed on the express authority of the Mutiny Act*, to which we must look, if there be need of any exposition, for its true meaning and intent.

It is no doubt a great military offence, at any time, for a sentinel to desert, or to fall asleep on the post to which he

* 1st Clause Mutiny Act.

is appointed, for the purpose of custody, or of watch, but it is not so serious a crime, or at least not likely to be attended with the same evil consequences, in the season of peace, as in that of war. If there be a fair distinction to be taken, as I conceive there is, in the offences, committed at one or the other season, the extreme punishment, held out by the Article, would seem applicable to the time of war. Such a construction receives authority from the Mutiny Act which states the offences, here contemplated, in inseparable company with, and in the midst of others, common only to a state of warfare, and of probable occurrence before an enemy.

From the earliest times these offences have been exemplarily punished. It is said that *Epaminondas*, in making the circuit of his camp, slew a sentinel whom he found sleeping, using this memorable saying, "that he did him "no harm, *leaving him* only as he *found* him." The remark is noticeable for the terseness or quaintness of expression, rather than the truth or sentiment which breathes in it.

The safety of an army always depends on the due vigilance of sentinels, who are required to watch, that others may sleep; whereby the camp may be seasonably refreshed from the daily labours of the field. But the requisite rest, for this salutary purpose, could not be freely enjoyed, unless there should be a perfect confidence in the watchfulness of those, who are assigned as the guardians of the repose and quiet of the camp.

Hence penalties of the heaviest kind have been resorted to, for punishing negligencies, and more active faults, that have a tendency to lessen the assurance, that ought to be felt, in the fidelity of sentinels. When it is considered, what important interests are committed, in the time of hostilities, to their charge, and how these may be injured or affected by wilful absence or inattention, it is not unnatural that these

crimes should have been, in all ages, and almost in all countries, regarded as capital offences. They have been so holden for many centuries by our own military regulations.

The 32d of the Articles of War of *James the Second*, particularly attaches to them, viz.:

" A sentinel who shall be found sleeping in any post, " garrison, trench, or the like (while he should be on his " duty), shall suffer death, or such other punishment as the " general court martial shall inflict for the same." And " if a sentinel or scout shall forsake his place, before he be " relieved or drawn off; or upon discovery of an enemy, shall " not give warning to his quarters, according to discretion, he " shall suffer death, or such other punishment as the general " court martial shall think fit."

Speaking further of a similar offence, the same Article says,

" And if any soldier employed as a scout, shall not go " upon that service, so far as he is commanded, or having " discovered an ambush or approach of the enemy, shall " not return forthwith to give notice or warning to his quar- " ters; or if he enter into any house, and there or else- " where be found sleeping, or drunk, whilst he should have " been upon service, he shall suffer death, or such other " punishment as shall be inflicted upon him by the general " court martial."

To prevent soldiers, when performing the duty of sentinels, from falling into indulgences, that might dispose them to, or surprise them into sleep, it was a part of the regulations in the elder military articles, that soldiers should not *sit down* on their watch, upon pain of *imprisonment* *.

The Romans had a rule, to the same effect, ordering that soldiers should *stand* or *walk* during the continuance of their

* The Articles drawn up by *Sutcliffe* in the time of *Queen Elizabeth*.

duty; and modern generals, foreign as well as those of our own country, have enjoined a similar practice to be observed in the armies which they have commanded.

Though it has been remarked, that the unlawful absence of sentinels from their post, or the sleeping on it, in time of peace, is not so grievous an offence, as if committed on actual service, it is by no means contended that it is not at any time, or under any circumstances, a very serious misdemeanor; and as such, has been at all times severely reprehended, but by a punishment inferior to death. "Yet would "I not (says an ancient military writer) that any man, in "punishing these faults, should proceed rashly: for if the "enemy be far off, and the danger little, this fault is much "lessened."

But it is however to be kept in mind, that a soldier is often placed in the charge of public offices, containing the most valuable deposits, stores, magazines, and quarters, which might be exposed, by any negligence on his part, to destruction or depredation, to the loss of the country—whence it may be inferred that his carelessness, or criminal neglect in the guardianship of them, can never be a trivial or slight offence. It might not be competent, in many cases, to form any correct notion of the value of the trust committed to him, and therefore it may be prudent to secure his attention, under suitable penalties in *all*, military usage sanctioning, in general, an exemplary punishment for offences of this highly criminal character.

The Article, on the face of it, applies only to private sentinels, but the spirit of it under the same circumstance extends, by the operation of the Mutiny Act, to every commissioned officer in the King's armies. A very slight reading of the first clause of the Mutiny Act will shew, that any one commissioned or in pay as an officer, is liable thereby to the extreme punishment awardable to

private soldiers, in the like cases, if he shall leave his post before relieved; or shall be found sleeping thereon. Commissioned officers may be understood to have other means of informing themselves of the law, applicable to their situation, than through the Articles of War, which are more particularly calculated for the information of soldiers, and are on that account ordered to be publicly read to them at stated periods; which may be one of the reasons, perhaps, why the Article is silent as to the former. But though the Article be mute, the Mutiny Act speaks in a clear tone.

Commissioned officers, it is true, cannot at any time be put exactly on the same duty as sentinels; but they are often placed on out-posts and on the skirts of camps, when it is their duty not only to see that the sentinels do their office, but to watch the movements of the enemy; which brings them precisely within the intent of the Mutiny Act, which for this purpose regards not sentinels by particular description, but persons *generally*, whether commissioned or non-commissioned officers or soldiers. It is the Article only that makes the distinction. It need scarcely be added, for the advice of officers, that the former attaches equally with the latter, to all the members of the military state.

ARTICLE 11th.—It is impracticable for armies to carry along with them the necessary provisions for their consumption during a lengthened campaign; and as they must in a great measure depend for their supply on the countries through which they pass, be they friendly or hostile, it is at all times for the interest of such armies, and has therefore been the peculiar object of care with the generals commanding them, to encourage and protect countrymen and others, bringing provisions to the camp.

The terror naturally occasioned by a present military force induces so great a disinclination, in the civil inhabitants

of the neighbourhood, to frequent the markets of the camp, that it requires a very constant and delicate precaution to counteract its effect, by the means of encouragement, and of protective regulations, holding out the hope and prospect of gain, and the assurance of personal safety. The usages of all ancient countries and the War Articles, in force with us from the earliest seasons, afford the strongest evidence of the policy of such a conduct, and the benefit resulting from the practice of it.

The military regulations have been uniform at all times, in awarding the extreme punishment of death to soldiers who should do any violence to the persons furnishing the army with provisions, or to their goods or merchandise.

In the war statutes of *Henry* the *Fifth* it is accordingly ordered, that " none under pain of death, shall dare to rob " or spoil any merchant or merchants, or presume to take " away from them any goods, especially victuals:" And again, more particularly in the orders of *Henry* the *Seventh*, that " none presume to take any manner of vitayle, horse- " mete, nor men's mete, without paying *therefor* the rea- " sonable pryce thereof, assised by the clerk of the market, " or other the king's officers thereunto ordeyned, upon " peyne of death." It is not necessary to advert to further Articles in the older war statutes that have relation to this subject.

In addition to these general ordinances, others were formerly devised, for settling the weights and measures of the camp, and the prices of provisions, and a proper forum appointed for deciding the disputes that might arise between countrymen, merchants, and the soldiery.

We find it ordained in the Statutes of *Henry* the *Fifth*—

" All contracts, crimes, and suits, shall be heard and " finally determined in our court, by the judgement of our " constable and mareschall, or in the absence of our con-

"stable, in the presence of our mareschall, if *one* or *both* "contractors, delinquents, or suitors, are belonging to our "army, whether soldiers or merchants, or handicrafts, &c."

Modern Articles have not been either so minute in their police regulations on this important point, or the general administration of justice to merchants and others, attendant on the camp; but they have not at any time been deficient in their penal denunciations against those, who should offer violence to persons bringing provisions and necessaries to the army.

The 11th Article of this Section evidently pursues the principle, if it adopts not the form, of the earlier ordinances.

It ordains, that—"Whatsoever officer, non-commissioned "officer, or soldier, shall do violence to any person who "brings provisions or other necessaries to the camp, garrison, or quarters, of our forces employed in foreign parts, "and shall be convicted thereof by a *general* court martial, "shall suffer death."

This is the first Article of War that assigns the punishment of death *absolutely* to any offender, without allowing a discretional power to the court, under circumstances, to abate the rigour of the law; which is expressive of the peculiar aggravation or enormity of the offence.

The Article has force only in *foreign* parts; the Mutiny Act providing, that no capital punishment shall be executed on offences in Great Britain, or the adjacent islands, that are not therein described to be so punishable, which is not the case here; the crime being declared by the regulation alone of the Crown, sanctioned however, as it has been shewn, by the customs and usage of war.

What the *nature* or the *degree* of the *violence*, which it is the intent of this Article to punish so grievously, is not to be collected from its letter. Looking solely to the Article, it would appear to be such violence only, as may be offered

towards the *persons* of the individuals, referred to in the Article; though the ancient and more modern ordinances would admit a much *wider* construction. In the latter, the *goods* or *property* of merchants and victuallers, &c., &c. appear to have been equally protected with their *persons*, and in some, even with a preference. This is to be remarked as well in the Articles immediately noticed, as those remaining to be mentioned.

" No man (says the 10th of the War Articles of the " time of Elizabeth) shall *spoile* or *hurt* any victualler or " other person coming with provisions for the army, or any " merchant that bringeth necessary commodities to the " camp; nor shall *breake open* any *shop*, or *steale* any thing " out of any *tent*, or *caban*, or *house*, upon payne of *death*."

This Article refers not only to personal injuries and robbery, that might be committed on the persons of those going to the army with provisions, but to larcenies, practised on the property of such persons, whilst within the limits or boundaries of the camp.

So in the Articles in the reign of *Charles* the *First*—

" No man shall presume to do the *smallest injury to any* " that bring necessaries to the leager, whether by *stealing* " from them or deceiving them, or by *violence*, in *taking* " their *horse* or *goods*, under the pain to be *accounted* and " *punished* as ENEMIES."

Here the principal object of protection is property, and the injury contemplated is *that* only, which might be effected to the persons of those bringing necessaries to the army, through the medium of such property or goods.

The 33d of the Articles of *James* the *Second* distinctly applies to both species of injuries.

" Whosoever shall do *violence* to *any* who shall bring " victuals to the camp or garrison, or shall *take* his *horse* or

"*goods*, shall suffer death or such other punishment as the "general court martial shall inflict."

It would seem from these authorities, that not only the persons of victuallers, merchants, and others, going with necessaries to the army, have been the objects of protection—but their wares and merchandises also; and that a violence committed on either, was punished with the same severity. And in the apparent policy or reason of the thing, they should both be placed under the equal guardianship of the military law.

But the Article under immediate consideration will not admit of the latitude of construction, in respect to the offence within its view, of which the older ordinances are capable.

It is not to be forgotten that the Article contains a highly penal regulation, which is to be construed strictly as to the offence, and leniently, in all cases, where it will admit of such a construction, for the supposed offender under it; and that on the face of it, it purports to relate to *violence* to the *person* of the individuals specified, and no other sort of injury. If any other species of violence should be thought to be intended, it is at least not to be gathered from the Article itself.

It is evident that violences to the goods of merchants and others were formerly punishable, and with the like rigour with personal violences, as shewn in the several Articles quoted. But these Articles have long ceased to be obligatory on the military community. Though they may be taken as evidence of the usage and custom of war, at the times to which they have reference, they cannot be brought to supply a defect, if any there be, in the Article in question, or explain any ambiguity, but what *openly* lies on the surface of the Article. For the members of a court martial, though

they may call in the *custom* of *war* to their aid, according to the oath administered to them respectively, if any *doubt* shall arise (which is not explained by the Articles of War or act of parliament), to assist or confirm their judgment—they cannot resort to such custom, where the letter of the Article is plain, and where no doubt appears upon the face of it, but is raised, if raised at all, by some external circumstance, as here,—the practice of other times.

If the Article, strictly considered, extends only to *personal violence*, it will remain to be shewn, what, on a fair and reasonable construction, may constitute such violence.

Homicide, maiming, or *wounding, detention* of the *person* against the will, or *assault* attended with *battery*, whatsoever may be the degree, would appear to be such a species of criminal violence as is comprehended by the Article; as also rape, or attempt at rape on the persons of women, passing with victuals, or other articles of necessity, for the consumption of the army: and, probably, may also be included in it, but of this I speak with some doubt, unless where *actual* force is an ingredient in the offence, what by the common law is termed *robbery*—*i. e.* the felonious and *forcible* taking, from the person of another, of goods or money by *violence*, or putting him in fear.

If the *taking* be not directly from the person, or in his *presence*, it is no robbery.

That a penny, as well as any larger sum, thus forcibly extorted, makes a robbery.

The *taking* must be by *force* or a previous putting in fear, which makes the violation of the person more atrocious than private stealing.

The previous violence, or putting in fear, is the criterion which distinguishes *larcenies* from other *robberies*.

The term "*putting* in *fear*" does not imply any great degree of terror or affright in the party robbed; it is enough

that so much force, or threatening by word or gesture be used, as might create an apprehension of danger, or induce a man to part with his property without or against his consent*.

It matters not how or in what way the party injured may be engaged when the offence be committed on him, whether it happens in going to or returning from the camp, or whilst he be there commorant: as the immunity regarded by the Article respects the person generally, and not his immediate employment at the time. The words of the Article are to the person who brings provisions or other necessaries to the camp—*i. e.* who is in the habit of bringing them—and have not relation to a single act. Though if they had so narrow a sense, they would include the returning as well as going, and the necessary sojourning whilst the provisions were sold.

In all, or any of these violences, may the penalty, awarded by this Article, in my humble apprehension, be inflicted on the military offender, be he officer or soldier.

If *larcenies* or *private stealing*, or even *burglarious taking* of the goods of merchants and others, unattended with *personal* violence to the owners, be not within the compass of *this*, as of other the more ancient war regulations, they are not on that account to be supposed, *without* the pale of the law military: there are, on the contrary, general and specific remedies appointed for such wrongs, under appropriate Articles †; where the hand of the court military, not being bound to administer a fixed and invariable measure of punishment, may adapt its severity to the existing circumstances of the case.

ARTICLE 12th.—This is equally penal and peremptory with the Article next preceding; enjoining that " whosoever

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* *Blackstone*, vol. 4, p. 243.

† Among others under the 4th Article of the 24th section.

"of the king's forces, employed in foreign parts, shall *force* "a *safe-guard*, and shall be convicted thereof by a general "court martial, shall suffer *death*."

A *safe-guard* has been understood, in modern times, by some of the army, to be synonimous with *sentinel*; but as the latter is a word of known signification, and, as we have just seen, in common use, it is fair to assume, that it would have been adopted here, if it could have imported that which the Article intends, instead of a term of some ambiguity at the present date. Besides, the offence, contemplated by the Article, is of such a magnitude, as to render it hardly credible, that it could be implied in any act of force, whatever might be its degree, used against a sentinel or guard in ordinary acceptation.

Safe-guard, in the sense in which it is employed in this place, is equivalent, as I take it, to *safe-conduct*—to force or violate which, had ever been held an atrocious offence. By the ancient statute law of the realm, it was deemed even a species of treason, against the Crown and dignity of the king, to break a *safe-conduct*, or to abet or receive the infractor of it*.

Safe-conducts or *safe-guards*, for they have been orrelatively and indifferently used†, have at all times been religiously regarded by the war regulations, as well as by the ordinary statutes; not only in respect of the high authority whence they flow, but of the interesting ends to which they serve. They have been found the best, and, perhaps, the only effectual means, that could be devised, for promoting the necessary intercourse between independent states, or the mu-

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* 2d *Henry* the *Fifth*, st. 1, c. 6.

† In the ordinances of the *Earl of Essex*, they are used in common, as thus:

"Whosoever shall be found to do violence against the lord general, his *safe-* "*guard*, or *safe-conduct*, shall die for it."

tual subjects of them, in the time of hostilities, and thereby effecting the most important international objects, either in mitigating the severity of war, or in putting an end to its ravages.

The right of granting *safe-conducts* was, and is amongst the chief of the king's prerogatives, and of old was reserved to be exercised under great solemnity by the Crown, or the General, or immediate lieutenant of the King, with the army, and none else; except under an especial commission for the purpose. Even the *constable* and *marshal*, officers of the highest importance, were excluded from the use of this supreme power, unless they had a specific licence from the king. Thus in the war ordinances of *Henry* the *Fifth:*

" Nor shall any of our inferior captains, the general of " our army only excepted, presume to give licence to any " enemy or prisoners to come into our army, without our " special leave, and with our *safe-conduct*, or that of the " constable of our army, if his commission *extend so far.* " Also, that none dare to *break*, or *violate* in any manner " any *safe-conduct* granted by us or our constable as afore- " said, under pain of *hanging* and *drawing*, and *confiscation* " of *hereditaments* and *goods*"—the peculiar punishment of treason.

In the war statutes of *Henry* the *Eighth*, there is an Article to the like effect, and another immediately following under the title " for giving of *safe-guard*," in which it is enjoined—

" That no man graunt no *salve-guard*, by writinge, nor " otherwise, to ne noble person, ne for the apatishing * of " any country, excepte the Kinge, upon payne of imprison- " ment, and his body to be punished at the king's pleasure. " Nor that no man graunt no *salve-guard* to none vittayllers,

* Protecting a country from the ravages of war in consideration of a stipulated compensation in money.

" ne to none other manner of persons, except the marshal " and provost of the king's hoste, upon payne abovesaid."

The marshal and provost, at that time, entertained a large and exclusive jurisdiction over all matters connected with the economy of the public markets.

The *salve-guard*, *safe-conduct*, or *passport*, for they are convertible terms, was generally in writing, and under seal; though it might be sometimes given with an attendant or present military party to vouch for, or to give safety or efficacy to the licence. In either of these cases, it was held in high estimation by the law of nations, and the inviolability of it so much observed, as that the infraction of it was considered a sufficient and just cause of war. Seeing, then, the authority which is insulted, as well as the great interests that might be hazarded or defeated, in the violation of this instrument, or medium of bringing adverse states together, for the purpose of effecting the most important civil purposes, when civil relations are generally deranged, it is not a matter of surprise, that the forcing or violating its protection, has in all times been declared a most heinous crime, punishable always with death, and with more or less circumstances of aggravation; and but in one instance a mitigable punishment under the discretion of the military court *.

The crime consists in the contempt of the supreme military authority, to the endangering of the public interests; whether such authority be exercised directly or representatively. But some distinctions, of too subtle a nature to be easily comprehended, have been taken, in the punishment awarded to the offence in the several cases; as in the 21st Article of the War Statutes of *Richard* the *Second:*

" That none be so hardy as to violate the safe-conduct of

† As in the Article of *James* the *Second*, which allows the court martial to adjudge the offender to death, or such other punishment as shall be inflicted by the sentence of a general court martial. 12th Article.

"our lord the King, upon pain of being *drawn* and *hanged*,
"and his *goods* and heritage *forfeited* to the king; nor to infringe the safe-conducts of our said *Lord* of *Lancaster*, seneschall, constable, and mareschall (who had been especially licensed to grant the same), upon payne of being "*beheaded*."

Besides the war regulations noticed, there are several others bearing on this offence, and one particularly under the express head of "Violating of Safe-guard," in the time of *Charles* the *First*, wherein it is ordained, that

"Whoever shall presume to violate his Majesty's *safe-guard*, shall die without mercy."

And in the Articles of War of *James* the *Second*, there is an Article on the same subject.

All of these speak of the offence of violating a *safe-guard*, with relation to the dignity and authority of the personage granting it, *i. e.* as the safe-guard of his Majesty, or of the lord-general, or of the general, lieutenant-general, or other commander in chief, which denotes a quality in it that could not be supposed to reside in an ordinary or private sentinel; who might often be placed on his post by an inferior officer, or employed on a service of honour or of show; and who could seldom be vested with so eminent a charge, as to make it necessary to punish a violence or force used against him with the certain and invariable penalty, in every case, of the loss of life.

But it is not insinuated, that an assault committed on any sentinel, by whomsoever posted, is not a military offence, and of a very criminal quality, involving as it does an insult of the authority directing the duty of such sentinel, and protecting him consequently in the discharge of it, as well as a private assault, that might provoke under the peculiar circumstances of the party offended, either dangerous resistance or opposition, or the temporary dereliction of station, and

possibly other consequences, even of a more fatal tendency. It is asserted only, that this latter offence, grave though it is admitted to be, is not described, nor to be prosecuted under this particular Article, which relates to a distinct crime, and at all times of a most aggravated character, and therefore always punishable with the highest degree of severity.

A violation of a safe-guard may consist, in any obstruction offered to the progress of him who bears it, in a maltreatment of his person,—in the seizure of his papers, or property, or any similar act of impediment or force exhibited against him—but in any or all of these cases, it will be a necessary ingredient in the offence, that the party offending had some previous knowledge of the *safe-guard*, either from the communication of the person bearing it, or from some other means; or otherwise he could not be guilty of the high contempt of the prerogative implied in the act.

That such a previous knowledge is of essence, may be concluded from the Articles of War of *James* the *Second*, where it is described as an integral and indispensable part of the offence *.

ARTICLE XIII.—They who are acquainted with the habits and customs of the camp, must know how essential to its safety it is, that the *watchword* should be kept secret from all who are not military sojourners within it. This is, at all times, the key, as it were, of the garrison or camp, and the sign by which the soldier can be known to and by his comrade in the night, and thereby contradistinguished from the stranger or the enemy. It is ever a matter of great precaution, therefore, with military commanders, that the word shall be communicated to none but the soldiers under

* Whoever shall presume to violate any safe-conduct or protection given by his Majesty, the general, lieutenant-general, or other commander in chief (*knowing* the *same*), shall suffer death, &c., 12th Article, *James* the *Second*.

their command, and to change it, on the instant, when there shall be the slightest suspicion that it has been by accident or design betrayed.

Vespasian took advantage of the loud and incautious repetition of the watchword by the soldiers of *Vitellius*, and turned it to their defeat.

In our own armies the countersign, which is the watchword for the night, is not given out in general orders, or communicated to any, but in a low voice, or whisper; nor is it in that way given to the guard generally, but to such private sentinels only, as shall be actually posted as such, for watching the ingress or egress of persons to or from the camp or garrison.

The parole, which is the word for the day, is usually inserted in general orders; but it cannot avail as a passport at night, unless it be accompanied with the countersign.

Accidents sometimes happen from a forgetfulness of the watchword; or from a careless or imperfect delivery of it when a party is challenged. It is related that *Pompey* had nearly been slain by his own soldiers in his wars in *Spain* against *Sartorius*, from his dilatory, and, perhaps more than all, from his bad pronunciation of the countersign.

The dangers arising from a disclosure of the watchword must be proportionably greater where the adverse armies use the same language. But in no case can it be exempt from hazard or peril, in as much as it rarely happens, that in armies opposed towards each other, there are not to be found individuals completely conversant with the language of both, or one another respectively; whereby they might alternately introduce, when it might serve a purpose, a party into the adversary's garrison, or conduct them thence in safety. Hence all the War Articles have dealt severely with the offence of the betrayal of the watchword, though it should be occasioned by negligence.

In the war articles of *Charles* the *First*, it is ordained—
"He that makes known the watchword without order, or
"gives any other word but what is given by the officer,
"shall die for it."

And in those of *James* the *Second*, there is an ordinance of the same tenor; but with an additional clause, allowing the court martial to substitute some other punishment, at its discretion, in the room of death.

The Article, now under review, adopts the latter provisions, subjecting any person belonging to his Majesty's forces, employed in *foreign parts*, to the punishment of death, or such other punishment as a general court martial may award, "who shall make known the watchword to any
"one who is not entitled to receive it, according to the rules
"or discipline of war, or shall give a parole or watchword
"different from what he received."

The latter circumstance might prove as prejudicial as the first; for though it could afford no information to an enemy, it might induce the most mischievous and ruinous confusion in the intended operations of our own armies.

From the words of the 13th Article, it will be seen, that the revealing of the watchword to any one not entitled to receive it, is equally an offence with the revealing it to the enemy; but the former might not, under circumstances, be so criminal an act as the latter. It could not be allowed to any one to give the parole to a stranger, whatever might be his relation, without affording a cover to an indirect communication to an enemy; and therefore it has been forbidden in all cases. The Article shews, negatively, to whom, and to whom only, it is to be imparted; *i. e.* to those who are *entitled* to *receive* it, according to the *rules* and *discipline* of *war:* among these are included the officers and soldiers, composing the strength of the army and garrison; and such others, I con-

clude, as have the common or especial privilege thereof, as licensed inhabitants, sutlers, camp-followers, and the like.

The countersign is not made known, as of course, to the latter description of persons, but on the sound discretion of the officer in command.

The unauthorized discovery of the watchword, in *Great Britain, Ireland, Jersey, Guernsey, Alderney, Sark* or *Man*, is declared also to be an offence, though not of so serious a complexion, as if it had been committed in foreign parts; and therefore the punishment of it is left to the discretion of a general court martial, with this limitation, however, that the sentence may not extend to life or limb; which cannot be affected by any ordinance, to have force within the realms, but what is constructed on the express authority of the Mutiny Act; and this Article originates wholly from the will and prerogative of the Crown.

ARTICLE XIV.—This, like the preceding Article, more especially relates to troops employed on foreign service; and *like* it, also extends, as to the offences thereby created, but under the same restrictions and limitations, to the forces serving in *Great Britain*, and *Ireland*, and the Islands last mentioned.

This Article makes it an offence capital, or to be otherwise punished at the discretion of a general court martial, in any one serving in the King's dominions beyond seas, or in foreign parts, " who, by *discharging fire arms, drawing* of " *swords, beating* of *drums*, or by any *other means* whatever, " shall occasion *false alarms* in camp, garrison, or quarters."

So early as in the war statutes of *Richard* the *Second*, it is declared to be a heavy offence to spread *false alarms*, and the provisions of these statutes have been continued in several succeeding regulations of the same description.

Under the title of " disturbances and public cries," a pu-

nishment, according to the custom of the times, is awarded by the war articles of *Henry* the *Fifth*, against any one, of what condition, nation, and degree, or dignity soever, who shall dare to make any clamour or disturbances, by which the army may be disturbed.

There are similar regulations of *Henry* the *Eighth*.

"Any person, presuming or attempting to make, or "causing or procuring to be made, any *outrageous escry* in "the host, either by day or by night, that he, that shall be "found the *beginner* thereof, to loose his goods and life, "and the rest to be imprisoned, and their bodies to be pu-"nished at the King's pleasure, and he that *certifieth* '*who* is "the *beginner*,' shall have forty shillings for his labour of "the marshall."

In the ordinance of the *Earl* of *Northumberland*, temp. *Charles* the *First*, there are two articles, comprehending most of the offences included in the present Article.

1. "No man shall give a *false alarm*, or *discharge* a *piece* "in the *night*, or make *any* noise, without a lawful cause, "upon pain of death."

2. "No man shall presume to draw his sword without "order, after the watch is set, upon pain of death."

Enough is to be learnt from these, without the recapitulation of further ordinances, of the ground and reasonableness of the law, as defined by the present Article.

The mischiefs it seeks to prevent, are first, the disturbance of the quiet of the camp or quarters, whereby the troops might be deprived of that seasonable refreshment from sleep, which nature and the fatigues of war render requisite; and secondly, the harassing and vexing of the soldiers by *unfounded alarms*, by the experience of the falsity of which, in former instances, they might chance to be deceived when the signal of alarm might be given, or be less able or disposed to exert themselves, from previous fatigue, by the needless ex-

citement of their vigilance, when their prompt and immediate services should be demanded: and who shall be able to tell, in the frequent, and often causeless, cry of "the enemy is "*coming*" when he *be* near in *fact?*

To preserve the public repose of the camp from being needlessly broken, the soldier's vigilance from being mocked, and his strength reduced by unnecessary fatigues; the noises specified in the Article, the usual signals indicative of alarm, are prohibited, unless there should be a true and subsisting cause for them, from being made or given in camp, garrison, or quarters, in a foreign land, under the heaviest pains.

The *occasioning* of *false alarm*, which may be attended with one or more of the evil consequences explained, is the offence punishable by the Article, whether it shall be brought about by the *discharge* of *fire-arms*, *drawing* of *swords*, *beating* of *drums*, or by any *other* means. What is meant by the latter term, it might be difficult if not impossible to particularise. By the old ordinances the cries of "*mounte*" or mountez " and *havock*," the exact means of which may not now be ascertained, were considered as unlawful and punished with death. By "*other* means" may be intended such noise, or cry, or signal, or report, as might be raised or made for the purpose of causing, or being calculated to cause, an unfounded alarm. It will not amount to the offence, but on the contrary it is a commendable act, if there be a reasonable ground for alarm, in any one to excite it by ordinary or even extraordinary means or by whatever instruments, be they what they may, that shall present themselves to his hands. If the following Article, found in a collection of the reign of *Elizabeth*, be of no absolute authority, it may serve as an illustration of the practice of the army at that time, on occasions of surprise or alarm.

"No man shall give an alarm unto the army marching or "lodging, without *just* cause, and that in *quiet* sort; nor

"shall any *tumultuously* runne, nor *cry* upon an *alarme* "*taken.*"

The offence consists in spreading *false alarms:* for the quiet or repose of the camp or garrison is merely *secondary* in a season of actually surrounding and threatening danger, the primary care being the *safety* of the forces.

Little is required to be said in conclusion of the present Article, and that may be well supplied by the experience and in the words of a well-informed and ingenious writer on the same subject.

"False alarms (says he) disquiet the army very much; "and often *trouble* those that are to *rest,* and therefore doth "the enemy often times suborne some to *keep* our men in "*continuall* alarm, that more easily he may prevail against "us—being *tyred* and *overwatched.* Those difficulties, "therefore, which the enemy casteth in our way, let us not "increase by our unskilfulness, and let us in our watches and "discoveries keep good order; and the rather, for that "*lodging* for the most part without *strong defence,* and "*marching* without *diligent discovery,* we lie open to many "surprises, and sodaine attempts of the enemy."

ARTICLE 15th.—The different offences, declared by this and the Article next following, are of the highest possible guilt that can be conceived either in civil or military society, being so many *overt* acts of treason, though not so denominated in the Article. It would be a useless expenditure of time to enlarge on the atrociousness of the crime, involved in the acts described and enumerated, as it may affect the safety of the Crown, or the best interests of the State; or to expatiate on the intrinsic guilt, inferred in the several acts, particularized in the Articles; they would appear too obvious to require any explanation. Yet as the utmost odium is entertained by all men against the general crime of treason, and as it is universally punished, when it is detected, and as

it ought, with a rigour, proportioned to its enormity, it may not be superfluous to notice the particular acts, which the law military of old has pronounced, and the Mutiny Act and the Articles of War of the present day have declared to constitute such offence: and first;

The holding *correspondence* with, or giving *intelligence* to the enemy, either *directly* or *indirectly*, both by the Mutiny Act, and the 15th Article of this Section, is stated to be an offence punishable with death, or such other punishment as a general court martial may award.

The governments of *Rome* and *Greece* inflicted the most exemplary punishment on this species of treason. We have a memorable instance, in *Marcellus* having put seventy persons to death at *Nola*, for maintaining a secret conversation and intelligence with *Hannibal*: and in the impalement of *Laurus*, at *Athens*, for a similar offence. The Egyptians did not punish it with equal severity, but with a measure appropriate to, and bearing a relation to the crime, *i. e.* by cutting out the offending member, the tongue; leaving the party to bear the evidence of his fault about him through life, and to afford a striking and living memorial of the consequence attendant on so mischievous and odious an offence.

Our civil institutions have exceeded even the ancient laws, in the severity of their enactments against the crime, if not in the wide application of it towards criminals.

The *correspondence*, drawing on it the punishment ordained by the Article, must be understood to be a *secret one; unknown* to, and *unauthorized* of the General, or the chief in command. In some of the older War Ordinances, it is so expressed, as in the compilation of the time of *Elizabeth*:

" Such as *practise* and entertaine intelligence with the
" enemy, *without direction* or *knowledge* of their *superiors*,
" shall be punished as *traitors*."

Otherwise it may be concluded, if the correspondence or

intelligence had been entertained with the privacy and countenance of the superior.

To have communication with the enemy in any way, without the direction of the General, was held to be treasonable, and the persons having such communication were considered and treated as traitors and rebels by the ordinances of the *Earl* of *Northumberland* *.

And again in the Articles of the *Earl* of *Essex*, in the Scottish expedition:

" No *man* shall at his own hand, without warrant of the
" committee, or of my lord general, have or keep intelli-
" gence with the enemy, by speech, letters, signs, or any
" other way, under the pain to be punished as a *traitor*."

The maintenance of an intercourse of this sort is *primâ facie* criminal, and in all instances, when it may be defensible, is to be justified by him who is detected in it, or his life will be the forfeit.

The 15th Article is founded on the provision of the Mutiny Act, but is neither so descriptive of the specific offences within its contemplation, nor the manner in which they may be committed, as the Act itself. The latter, following the course of the older ordinances, states that whether the correspondence holden, or advice or intelligence given, be written, or oral, or symbolical, that is, by letters, messages, signs, tokens, or by any manner of way whatsoever, the act will be equally criminal. And so whether the intelligence pass between an enemy or a *rebel*.

It is said by an eminent legal authority, " that the same
" acts of adherence, or aid, which (when applied to foreign
" enemies) will (when afforded to our own fellow-subjects, in

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* Even to speak with a drum or trumpet, or any other sent by the enemy, without order, was by the same ordinances declared to be a misdemeanor, and punishable accordingly.

" actual rebellion at home) amount to high treason, come " under the description of levying war against the king *."

In respect to letters intended for the advice of the enemy, it will be no defence to say, that they were stayed in their passage to his hands: for it has been ruled in *Hensey's* case, that sending intelligence to the enemy of the destinations and designs of this kingdom, in order to assist them in their operations against us, or in defence of themselves, is high treason, although such correspondence should be intercepted †.

The treasonable intent, so far as it depended on the will and the power possibly of the mind conceiving it, is complete, and certainly sufficiently evidenced, by putting the intelligence in progress to the hands of the enemy, and if it be frustrated in its travel, it is not owing to any repentance of the heart imagining the treason, but the vigilance of others, or possibly by some providential intervention.

The same doctrine, as in the latter case, was held in the case of *Stone*, tried before *Lord Kenyon*, in the King's Bench, in Hilary Term, 1796. The case was also of an *intercepted* letter. It was *further* ruled here, that if the paper or letter sent to the enemy, contained advice *not* to invade this country, if sent with the *intention* of assisting their councils in their conduct, and in the prosecution of the war, was high treason ‡. The effect of such advice in discountenancing an attempt at the moment, when the country should be well prepared, might be to induce him to husband his resources for a more convenient opportunity, when it might be taken unawares.

It matters not whether the intelligence given have relation to the operations on one side, or other; for it will be treasonable in the same degree, if it shew the weakness of the

* Blackstone 4th vol.

† 1 Barrington, 650.

‡ 6 T. R. 527.

provision or resources of the garrison or camp to the enemy, and thereby encourage his assault.

In the defence of *Pavia*, a soldier was suspected by *Anthony de Lava*, the governor of that city, to have informed the French, that there was a deficient store of powder within the citadel; and he was thereupon delivered to a military tribunal for trial, and having admitted the fact, he was hanged and quartered.

It may be briefly observed, that any counsel communicated, having a tendency to direct or embolden the enemy in his attack, or to weaken the efforts of the resistance prepared against him, is an indisputable act of treason.

There are other distinct crimes, amounting to acts of treason, described in the first clause of the Mutiny Act, if not of the same species, of the same kind with those which have been just mentioned, that are not specifically set forth as objects of punishment under the present Article. These are the *entering* into *any treaty*, or *terms* with rebels or enemies, without his Majesty's leave or licence of the General or chief commander.

In the Articles of War of *James* the *Second*, which have supplied the greatest part of the materials, and in many instances the words of our modern Articles of War, there is a direct provision to this effect:

"Whatever regiment, troop, or company (says the 8th "Article), shall *treat* with such rebels, or enemies, or enter "into any condition with them, without his Majesty's leave, "or leave of the general, lieutenant-general, or the chief "commander in his absence; the officers of such regiment, "troop or company, who are found guilty, shall *die for it*; "and of the soldiers who shall consent thereunto, every "tenth man by lot shall be hanged, and the rest punished at "the discretion of the general court martial."

In the more accurate knowledge of the relationship of men

to one another in military command, as well as of their duties respectively, and of the true principles and science of legislation at the present day, it is not to be wondered, that the Articles of War, now in force, contain not any sweeping regulation against officers *generally*, or for the *decimation* of the soldiery, who might be found to be tainted with any of the species of treason, set forth in the Article last mentioned; but it appears somewhat extraordinary, that the Article, now before us, is altogether silent on the subject of the specific offences, which the Mutiny Act, notwithstanding its generality, has thought it expedient to particularize, and which, from the consequences they may entail, on the offenders, would seem to demand a particular description. It may have been supposed that the offences in question may be included under the term of *holding correspondence*, since without some communication by letter or message, it could rarely happen that any treaty could be maintained or any terms concluded on: yet the latter, even, under this construction, would seem a much more aggravated act than the former, and to require some distinction.

Although the 15th Article takes no specific notice of the offences, last alluded to, they are nevertheless such as a general court martial is bound to take cognizance of, by the legislative enactment, when they are brought legally before it, and to award such punishment to them, as such enactment ordains.

ARTICLE 16th.—Every act of adherence to the king's enemies, whether it be by sending money, or by furnishing provisions, or by supplying them with arms, or the like, is holden by the military, as well as civil law, an act as highly criminal, if not of a superior degree to that, which is described in the preceding Article; for by the aid of such supplies the enemy has more the means of carrying on his hostilities, and of resisting the efforts of his Majesty's armies. It has been

reckoned always the same species of crime, to afford any collateral or incidental aid or comfort to the enemy, either in the prosecution of his design, or in sheltering him from any of the evils consequent on the issue of it.

This Article, adopting nearly the words of former ordinances*, declares, that, "whoever shall *relieve* the enemy "with *money, victuals,* or *ammunition,* or shall *knowingly* "*harbour* or *protect an enemy,* shall suffer *death,* or such "other punishment as by a general court martial shall be "awarded."

The offences, in the view of the Article, are so clearly defined, and of so marked a hue, as to need not the slightest illustration.

When I have called the several criminal acts, enumerated in this and the foregoing Article, so many acts of treason, it has been for the sake of impressing on the mind of the military reader, the heinous quality of the acts, and not of suggesting, that they are therein so designated or intended to be punished, as such, by the 15th or the present Article. They are spoken of and treated as military crimes merely—and are to be tried and punished according to the usual form of proceedings in courts martial, and the ordinary course of military execution, without the legal consequences attendant on a conviction of the like offences in the common law courts. It is not, however, to be forgotten, that the crimes mentioned, constituting, as it has been shewn, so many overt acts of treason, by the ordinary law of the realm, may be prosecuted as such, at the instance of the Crown, if it shall be so advised, and at its election, in the king's ordinary courts; and where, if proven, will induce the same judgment, and legal

* The ordinances of the *Earl* of *Northumberland,* under the title of the "Relief of the Enemy," is of the following tenor:—

"No man shall relieve the enemy with money, victual, ammunition; "neither harbour or receive any such, upon pain of death."

consequences, as if the offences had been committed by citizens or others *not* of the military profession*. But the Crown, having once made its election, whether to try the offence in a civil or military court, will be bound by it; and will not be at liberty to resort afterwards to a second court in the event of failure in the first.

The sentence of the court martial, in respect to these offences, being more mild than the judgment of the common law courts, is not from any favourable regard to the nature of the crime, but may be owing, perhaps, to the consideration, that the military culprit is deprived, from the peculiar constitution of courts martial, and the proceedings obtaining therein, of certain benefits which are allowed to persons tried for the like offences in the civil courts—namely, the right of peremptory challenge of jurors to a great extent, of counsel to be assigned to him, with other less conspicuous advantages; these, however, are more than counterbalanced by the comparative lenity of the penalties attendant on conviction, and the more liberal course of prosecution, in the military courts.

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* By the 2d and 3d of *Queen Anne*, cap. 30,—the corresponding of officers or soldiers with the queen's enemies beyond sea, was declared to be *high treason*.

By the same statute, it was also specifically enacted, that all treasons and felonies, therein named, might be tried at the Queen's Bench at *Westminster*.

Persons acquitted by court martial not to be prosecuted again; and no attainder to corrupt the blood of the heir.

That if any peer of the realm should commit any of the offences aforesaid, in any part beyond seas, and should not have been there tried for the same by *martial law*, and after his return into the realm should be *indicted* for any offence by that act, declared or enacted to be treason or felony, that then, and after such indictment, he should have his trial by his peers, in such like manner and form as had been accustomed.

Persons indicted of treason, &c., to have the benefit of the act of 7 *William* the *Third*, c. 3.

ARTICLE 17th.—This is an Article of economical regulation, rather than of penal enactment; directing that all *public* stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, clothing, forage, or[a] provisions, shall be secured for the king's service—and that the officers commanding in chief shall be answerable for any neglect in securing them. Though public stores, captured, are made in the first instance applicable to the use of the king's forces; it seldom, if ever happens, in practice, but that the captors are remunerated with some allowance in their stead*.

ARTICLE 18th provides, that—

"If any officer, non-commissioned officer, or soldier, shall "leave his commanding officer, or his post, or colours, to go "in search of plunder, he shall, upon being convicted there-"of, suffer *death*, or such other punishment as by a general "court martial shall be awarded."

The offence described in this Article is an aggravate or accumulate crime; comprehending, with an open and manifest intent of marauding or plundering, an unlicensed departure from or desertion of the post assigned, and expected to be preserved. The latter circumstance, as has been above explained †, constitutes of itself a capital offence

The mischiefs produced, or likely to be produced, by this offence, are many and obvious; among which may be numbered, the diversion of the soldiery from the first and grand object, the pursuit and destruction of the enemy, for a trifling and pitiful gain; the dispersion often of the strength of an army to such wide and distant points, as to render it

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* By the Articles of War of *James* the *Second*, one tenth part, of the public stores captured, was reserved or *laid apart*, for the relief of the sick and maimed soldiers—25th Article.

† See what has been said on the 10th Article of the present section.

impracticable for it to be collected again on a sudden emergency or need; the easy extermination of the forces in this divided and isolated state; the encouragement of the enemy thereby to return to the rencontre, and the excitement or exasperation of his feelings and courage for the attack; subdued and reduced means for resisting him; with the corruption and enervation of the soldiery, by the indulgence in a base and unruly passion. The anticipation of any one of the results enumerated, is sufficient to have induced the rulers or generals of ancient, as well as modern armies, to punish so dangerous an offence with the highest possible punishment.

When men went out, in earlier times, with their captains, for the express and licensed purpose of plunder, they were liable to arrest, and not permitted to share in the booty, if they straggled from their commanders*.

So if they were permitted to go out from the camp or body of the army, for any lawful purpose, and they turned such permission to an unlawful end, they were considered as much criminal, as if they had not originally obtained such licence. Thus in the general orders of the *Duke* of *Cumberland*, in 1745, it was ordered, that "All men gathering "beans, pease, &c. under *pretence* of *rooting*, to be *hanged* "as *marauders*, without *trial*."

On all occasions, where soldiers have left the army, or forsaken their place, without leave, though it should have been from the fairest promise of obtaining spoil from the foe, or the most secure prospect of return, the departure has always been held criminal, as in the military institutes of all times, there have been general regulations strictly prohibitory of the act. As for instance, in the war ordinances of the *Earl* of *Northumberland*:

* By the war statutes of *Henry* the *Fifth*, title General Equitations.

"No man upon any good success shall fall a *pillaging* "before *licence*, or a *sign* given, upon pain of death."

And again, in the 24th Article of *James* the *Second*,

"When it shall please God that his Majesty's forces shall "beat the rebel or enemy, every man shall follow his officer "in the chase; but whosoever shall presume to *pillage* or "*plunder*, till the rebels or enemy be *entirely beaten*, he "shall suffer death, or such other punishment as shall be "pronounced against him by the general court martial; and "the pillage, so gotten, shall be *forfeited* to the use of the "sick and maimed soldiers."

The evils, resulting from private plunder, are acknowledged, in the pains that have been taken for repressing the practice; but there are abundant records of their occurrence, in fact, in the history of other and the present times. The Samnites having routed and dispersed the Romans in a serious conflict, instead of following up the fugitives, betook themselves to the plunder of the field, and in the avidity of searching for spoil, being separated into numberless scattered parties, they were assaulted by the re-assured and re-collected enemy, and completely and irrecoverably overthrown in their turn.

The greatest general, in our own days, was unhappily disappointed, in the best fruits of his hard-contested battles, by a branch of his army having desisted from the pursuit of the French, then in disorderly flight, to profit by the untimely seizure of their abandoned baggage. Like *Cæsar*, he had less difficulty in discomfiting the battalia opposed to him, than in restraining in the hour of victory the licentiousness of his own armies. If the British captain reaped not here Cæsarean glory; it was not from a failure in him of any of the transcendent qualities of his great prototype; but that the British discipline was not equal to the Roman.

Another of our most accomplished, but alas! not of the

number of our fortunate commanders, found it one of the most bitter and mortifying circumstances attendant on his memorable, but not inglorious retreat from *Spain*, to have been unable to subdue, even by the wise and rigid exercise of the severity placed by the law military in his hands, the disposition of his soldiers to plunder the inhabitants of the friendly country through which they passed: whereby were hazarded the credit and character of the national army, and the supply and safety of the troops.

Other examples of the effect of this pernicious practice might be mentioned, if enough had not been noticed, to defend the principle of this regulation, and to impress on the mind of every commander, the necessity of the enforcement of it.

ARTICLE 19th.—All nations have been studious, in the construction of their military regulations, of the preservation of arms and military implements, the necessary and indispensable means of defence, of every state or people; and of inculcating on the minds of those who bear arms, a respect and reverence towards them.

Laws, with various and different penalties, have in consequence been made, agreeable to the habits and usages of distinct countries, enjoining the keeping of offensive and defensive weapons, and other warlike habiliments, in good and perfect order, for immediate use, denouncing the most exemplary punishment against those, who should sell or negligently lose them, and more especially such, who should basely or cowardly forsake or cast them away in the field of battle.

To render the shield, the principal defensive armour of the Lacedæmonians, more dear and sacred, in the eyes of the youthful warrior, it was presented to him, when he first entered into military life, by the hand of his mother, with a pious exhortation, that he would bring it safe from the wars,

or be brought back upon it. And it is said to have been the chief anxiety of *Epaminondas*, in the extreme agony of death, to ascertain whether his shield was secure.

The loss of the shield among the Romans was also estimated as a great disgrace, and the phrase "relictâ *non* "*benè* parmulâ*," borrowed from the field, became descriptive in time of a dishonourable defeat in any civil or general pursuit.

In the history of *Rome*, we meet with several examples of severer punishments, such as beheading, or beating to death with cudgels, inflicted on those, who had sold or thrown down their arms, or even let fall their ensigns, in the time of action; every one of these offences being treated as capital.

So attached to their arms were the heroes of older times, that they preferred the retention of them, to life itself†.

Archilochus, the poet, was banished from *Sparta*, for presuming to maintain, that it is better for a soldier to cast away his arms, than to die; "Melius est arma abjicere "quam mori."

By the Scottish law, also, it was deemed infamous in any soldier to pawn his *sword*, and he was thereby degraded as unworthy the company of his fellows; but in the last degree criminal to throw it away in battle.

It has ever been regarded in the English ordinances, as a base, as well as criminal act, if a soldier sell or pawn, or through negligence lose his arms, or equipments; but differently punished, according to the policy of the day.

There is an ordinance of the time of *Elizabeth*, ordaining, that "No souldier shall sell, or pawne, or lend, or loose, "or give, or cast away, or play for, or otherwise make

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* "Having relinquished his shield not honourably."

† It is said of *Chabrias*, when his ship was sinking, and when he might have reached the shore in safety, by the abandonment of his arms, that he chose rather to die *with* them, than to live *without* them.

" away with his horse, or arms, or weapons, or furniture, where-
" with he is appointed to serve: nor shall suffer his horse by
" his default to decay, or his arms to rust or goe to spoile,
" uppon paine of *ymprisonment*, and *infamie* both to him
" that offendeth, and to his abettors and aydors."

Military writers, about this date, make some distinction in the crime, or the *penalty attendant* on it from the description or importance of the arms or armour that may be sold. If a man sold his *greaves* (iron boots), or his *pouldrons* (the covering for the shoulders), he ought, according to these, to be *beaten*; but if his shield, his head-piece, or sword, he should be punished as a deserter.

If the arms were sold to the enemy, it was at all times a capital offence.

The Articles of *Charles* the *First* are stricter than those last mentioned.

" If a pikeman (say they) throw away his pike, or a
" musketteer his musket, or bandelier, he or they shall be
" punished with death." And,

" Whoever in skirmish shall fling away his powder out of
" his bandaliers, that he may the sooner come off, shall be
" punished with death."

In the general orders of the *Duke* of *Cumberland*, 1745, even an *attempt* at selling the public arms or cattle, is deemed a capital offence, such orders running—

" If it appears that any soldier has *offered* to *sell* any
" horses or arms, &c. belonging to any corps in the army,
" he shall be *hanged*."

In respect to the unlawful selling, or loss, or deterioration of arms, or the waste of ammunition, the Articles of War of the present day, proceed, as may be seen from what has been stated in the thirteenth section, on the principle acted on in the time of *Elizabeth*, rather than at later periods; but as to the offence of *casting* them *away*, they have been equally penal with those of more ancient times.

By the Article before us, it is ordained that—

" Any person belonging to our forces (meaning the king's) " employed in *foreign parts*, who shall *cast away* his *arms* " or *ammunition*, shall suffer *death*, or such other punish- " ment as by a general court martial shall be awarded."

The offence, described in this place, has relation to a season of war, and the field of action, or a proximity to it, in a foreign land. The guilt implied in it, is not so much in the waste of the King's arms or ammunition, though that be a grave crime, as in the pusillanimity, selfishness, and treachery discovered in the act. It is rendering up the instruments of assault and defence, which the King had intrusted in confidence to the hands of the soldier, for the protection of the interests of the state, and for his own and his fellows' safety; it is reducing the soldier from an efficient instrument of strength to a helpless and defenceless limb of the military community, and paralysing, so much as they depend on an unity of action and confidential co-operation, the efforts of his brethren in arms; it is the giving himself up, with others, an easy prey to the enemy; nay, furnishing the latter with the very weapons to destroy himself and his friends, not only at the time, but at all times thereafter, and this through a cowardly or dastardly fear, dictating an unincumbered flight, as a probable means of individual escape from the pressure of an imminent foe, when a steady and determined presence and bearing in his proper place, might have rendered sure his own and his fellows' security in an honourable retreat, or possibly a glorious victory. I have purposely omitted to dwell on the loss of the services of the soldier, who may be guilty of so unmilitary an offence; since the thinning of the ranks of such a poltroon, except in the very time or act of the commission of the crime, must be a benefit rather than an evil; for it is throwing on the enemy the necessity of pro-

viding for one, who could be as little useful or profitable to him, as to the party that previously supported him.

If the *casting away* of *arms* or *ammunition* be not in *meditation* of *flight;* and for the purpose that the offender therein "may the *sooner come off*" as explained in an Article almost immediately quoted; but a *dereliction* of the military union, in a wanton renunciation of the only means by which it can be sustained, it is an offence of the same character, and of the same magnitude in the contemplation of the present Article, which attaches *generally* to the casting away of arms or munition, without any regard to the *particular* motive to the act, whether it should proceed from cowardice, or disaffection to the service.

If the offence should be committed in Great Britain, Ireland, or contiguous islands, it is not capital; but it is left to a general court martial to award such punishment to it, as in its discretion may seem meet; for it is an offence declared by the Articles of War, and *not* by the Mutiny Act, and therefore cannot be visited, within the King's proper dominions, with the extreme penalty.

On the offence of the *casting away* of arms, it would be useless to enlarge, or on the evidence, by which it is to be made out; it is in all cases a plain matter of fact, disentangled from all legal questions or inferences. It consists, as it may be briefly stated, in a wilful, and unauthorized throwing away of any warlike weapons, or of ammunition, especially intrusted to the individual for his use, in the public service, and in that respect may be distinguished from the flinging away of any other arms, coming accidentally into his possession, the latter of which it might be necessary, from circumstances, to disencumber himself of in action, the more effectually to employ those immediately confided to him, and which may be said to be his own. Also, if orders

should be given, in the heat of pursuit by the enemy, for the retreating army to lighten itself of any extraordinary stores, or even common instruments of offence (for extreme cases sometimes warrant the most painful sacrifices), the casting them away in such a case would become a matter of necessity, in obedience to the will of a superior, and therefore free from offence. But the special circumstances of justification in either case, it will be for the accused to prove in his plea or defence.

ARTICLE 20th.—This Article awards the like punishment as the preceding one, to any officer or soldier,

I. " Who shall misbehave himself before the enemy:

II. " Or shall shamefully abandon or deliver up any garri-
" son, fortress, post, or guard, committed to his charge, or
" which he shall be commanded to defend."

The several crimes described in this Article import cowardice, or a composite of cowardice with treachery.

1.—The misbehaviour, mentioned in the first branch of the Article, in order to attach to it the grievous penalty of death, or other apportionate punishment, must be a misbehaviour in the *face* or *presence* of the enemy; and then not a general, but a military misconduct.

It is to be wished, that the culpable behaviour, falling within the penalty of the Article, had been set forth with more particularity than it is therein at present described; that officers or soldiers should have warning of the species of crime, for which, by possibility, they might be called upon to answer; or, that being so called upon, they might the better be able to resist the accusation in the first instance, or shape a direct and specific defence against it. For from the general manner in which the crime is here described, it is impossible to form any precise notion of the act or acts, which may be conceived to constitute it; and from the indefinite way in which charges on this Article are usually

drawn up, it is impracticable to judge from them, or the sentence, which is all that is commonly published for the information of the army, of what specific act the accused was either acquitted or found guilty. It surely is as necessary here, where a conviction may be followed with such dreadful consequences, that the fact or facts, whereon the charge is grounded, should be clearly specified, as they are required to be by the 28th Article of the 16th Section, in respect to other misbehaviour of the same general and unspecified kind with that which is the object of the present Article. If this specification be requisite, when a minor punishment may ensue, it is doubly so where it may be the highest.

As the Article is so deficient in the description of the offence, it comes more incumbent on him who is desirous of explaining it, to shew what has been deemed to amount to it, both in its aggravated and mildest character, so as to call forth the greatest or a qualified or moderated measure of punishment.

To *forsake* the *ensigns*, to *desert* the *ranks*, or to *fly before* the *enemy*, has been from the earliest times considered among the worst crimes of which a soldier can be guilty: and there are numerous instances where such defection has been punished by Generals of old, in a summary way, and by their own swords *, as well as by the hands of the execu-

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* *Antonius Pr.* one of the centurions in the army of *Vespasian*, perceiving that a standard bearer was turning his back to the enemy, immediately pierced him with his javelin.

On the descent of a British force in *Jamaica*, somewhat about the year 1653, *General Venables* issued orders, that if any man should be found to run away, the next man to him should put him to death; which if he failed to do, he should be liable to the severest punishment by a court martial.

This order was occasioned, as it is hinted by *M'Arthur*, by a very memorable instance of cowardice, exhibited by a British adjutant-general, in the first operations against the island of *Hispaniola*. Be this as it may it has been imitated in similar cases; and may be considered as a justifia-

tioner, and that in prodigal numbers, by the well-known process of *decimation.* The severity of the ancients, as applicable to this unworthy act, has been adopted into the military codes of more modern days.

It is stated in the compilation of the time of *Elizabeth*, that—

"No soldier, nor other, being once placed in *array*, either
"in *marching* or *fighting*, shall depart thence without lawful
"cause. Whosoever either to *runne*, to *spoile*, or to *fly*
"*away*, doth *abandon* his *ensigne*, or *standing*, when he is
"ranged to serve, shall suffer *death*."

Whether the fault was committed in time of march or in action, it seemed to have been esteemed by this Article of the same guilt.

The ordinances, for the government of the opposed armies of the king and the parliament, in the time of *Charles* the *First*, treat the offences specified as capital only, when they occur in actual engagement.

Thus in the ordinances of the *Earl* of *Northumberland*—

"No man shall abandon his colours, or fly away in any
"*battle*, upon pain of death."

And in those of the *Earl* of *Essex*—

"Every man, when the *alarm* is given, shall repair speedily
"to his colours; no man shall forsake or flee from his co-
"lours; no man in the country shall *reset* them that *flee*,
"under the pain of death."

To *reset* or *reintroduce* fugitives, even, into their former place, was a species of misbehaviour, according to the latter Article, tantamount in guilt to the original offence; probably from its affording a cover to the first crime, or pos-

ble expedient, to put a sudden stop to a beginning flight, though scarcely to be acted on as a general rule, as it is easy to foresee, that in certain cases it might produce as mischievous effects as any that an enemy might achieve.

sibly from its subjecting the army, when rejoined by them, to a second desertion, or to corruption or contamination by example.

Again in the 22d Article of *James* the *Second*, it is ordained that—

"Whoever shall run from his colours, or doth not defend "them to the utmost of his power, shall suffer death."

It was holden equally criminal to leave the ramparts of a garrison, or the trenches, or approaches to it, at the time of assault. This would expose the garrison besieged, or the works opposed to it, to as great mischiefs as in the case when soldiers fly from their colours or ranks in the field; and is a demonstration of the same fault in substance, though varying something in circumstance: it is the quitting of the place assigned, the post of duty, through a base and ignoble motive.

To give counsel, or to use words of persuasion to others, to induce them to flight, would undoubtedly incur the like guilt or criminality, as in the other cases particularized; and is indeed specified among the crimes enumerated in the succeeding Article.

Most of the offences, of which mention has been made, would appear rather as the offences of individuals than of men in bodies, or acting together in company; in which latter case some distinction seems to have been taken, in the lenient construction of the crime, probably from regarding the act, as the effect of a general impression, and not of individual cowardice; or possibly in a sudden and aggregate fault of this sort it might be impossible to ascertain, with satisfactory precision, with whom it originated.

"A regiment or company of horse or foot, that chargeth "the enemy, and *retreats* before they are come to *handy* "*strokes*, shall (say the ordinances of the *Earl* of *Northum-*

"*berland*) answer it before a council of war, and if the "fault be found in the *officers*, they shall be banished the "camp; if in the *soldiers*, then every tenth man shall be "punished at discretion, and the rest serve for pioneers, "and scavengers, till a worthy exploit take off that blot."

The *Earl* of *Essex's* ordinances are more severe on the offence, declaring that—

"Whosoever, officer or soldier, shall be found to be in "default, they shall be punished by death, or some *shameful* "punishment, as the council of war shall find their cowardice "to deserve."

To other misbehaviour, than those of *flight* from the *colours*, or remissness in defending them, whether evinced in the acts of individuals or of bodies, the Articles of *James* the *Second* were more indulgent, as is manifest from the 23d Article, viz.

"If any officers or soldiers, regiment, troop, or company, "or commanded party, shall *not* behave themselves in *fight* "against the enemy, as they *ought* to do, they shall "suffer such punishment as the general court martial shall "inflict."

The penalty, in the discretion of the court, could not extend to death; as that alone could be awarded in the cases particularized in the 22d Article, referred to above.

It would be a work of difficulty, if it were capable of execution, to assign all the different species of misbehaviour, in the presence of an enemy, that might render an officer or soldier liable to the heaviest punishment awardable under this Article. There are some offences to which the term of misbehaviour might be strictly applicable, such, for instance, as intoxication, leaving, as it generally has the effect of rendering the party affected by it, wholly unfit for any military operation, and as much unserviceable in his place, as if he had voluntarily withdrawn himself from it, that would not seem

to justify the application to them of the higher degree of severity; in as much as *immediate* drunkenness, though under circumstances admitting of little excuse, does not exhibit any positive crime beyond itself; the evil consequences resulting from it being of an accidental, and in some sort of an involuntary nature, and therefore not deserving or requiring so penal a visitation. Courage to protect himself, and through the exertion of that—the first of military virtues, to co-operate, with those in contact with him, in sustaining the unity of action of the corps or army with which he serves, is not incompatible with the temporary disability, under which an ebriated person may labour. And I would conclude, from what has been shewn, that unless there be an abandonment of some positive or demonstrative duty (cowardice, deducible from some unquestionable act), that the misbehaviour, to which the highest penalty is attachable, will not be consummated.

An actual *flying* from the colours, *running* from the *ranks*, or desertion of the post assigned, without leave and without cause, are and ever have been held as decisive characteristics of cowardice, and on that account have been punished in the most exemplary manner—but other acts, which do not necessarily include cowardice, or admit of such an explanation as may exclude the idea of that base quality, are and have always been deemed subject to a less serious sentence.

At a general court martial, holden at *Gibraltar*, in the year 1811, *Captain G. W. Barnes* of the second battalion 89th regiment, was arraigned on the under-mentioned charge:—

"With *misbehaving* himself before the enemy, in the expedition under the command of *Major-General Lord Blayney*, in the month of October, 1810."

On which the court came to the following decision:—

"That the prisoner was so far guilty of misbehaving be-

" fore the enemy, as he was *not* with his company at the " moment of the *general retreat;* but, in consequence of the " good conduct of the prisoner previous to the retreat, the " court did not find him guilty of *personal cowardice.* The " court therefore sentenced him to be *cashiered,* but at the " same time humbly presumed to recommend him as an " object of clemency to his Royal Highness the Prince " Regent."

His Royal Highness the Prince Regent was pleased to approve the finding of the court, but observed—" that al- " though *Captain B.* had not been found guilty of cow- " ardice, yet in consideration of the nature of the crime of " which he had been convicted, his Royal Highness had not " considered it expedient to give effect to the recommenda- " tion of the court in the prisoner's behalf, further than to " mitigate the term of *cashiering* into that of *dismissal* from " his Majesty's service."

The sentence of the court having negatived the principal obnoxious quality in the alleged offence, reduced the misbe- haviour mentioned in the charge, to a mere absence from his the accused's company in the hour of service—which, though not a misbehaviour of the most aggravate character, was nevertheless deemed to be of such a complexion, as not to be allowed, without danger to military discipline, to escape from reprehension *.

Any thing that I would add on this subject, seems to have

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* In a shameful case of cowardice, so proven, and in the case referred to in the last note, the court martial sentenced the offender, an adjutant-gene- ral, " to be cashiered, and his sword to be broken over his head, and that he " should do the duty of a *swabber*, in keeping clean the hospital-ship of the " fleet." It would not be easy to devise a punishment, too ignominious for such a *crime*, but the policy of applying it to certain *criminals*, on account of their rank or office, and the respect and authority generally connected with it, and so necessary to be regarded in military society, might very reasonably be doubted.

been anticipated by an author, who wrote more than two centuries ago, whose phraseology I most willingly adopt, not from any consultation of my own ease, but from an impression of the greater consideration that is due to the opinion of one of his apparent and actual experience, than any which I could presume to suggest of myself.

" Cowardice," says the learned writer, " is the cause and " occasion of many other transgressions for who is irreso- " lute, or apt to entertaine feare, is also soon persuaded to " save himself with dishonour.

" By cowardice, souldiers do forsake their ranks, and " sometimes abandon their ensigne; which faults the Ro- " manes punished with death.

" It was long since, by an edict, commanded in *France*, " that whosoever did forsake his colours, or the ranke " wherein he was placed, should receive punishment by " passing the pikes.

" Another kind of cowardice is to *fain* sicknesse, or with- " out leave to be absent from the armie. He is also culpa- " ble of that crime, that leaveth his place of standing upon " the wall, *during* the *assault*, or shall *abandon* the *trench*; " yet true it is, if any such fault be committed, at any other " time than *during* the *assault*, the same is not *absolutely* " capital, but is *arbitrable*.

" It hath been also anciently used, that if a souldier, " without lawful excuse, did goe from the watch, or " office of scout, or any other office *allotted* unto him " by the sergeant, that then he should be judged to passe " the pikes or harquebuzes, accordinge to that kinde of " weapon wherewith he served. And if *many* souldiers " (as a whole ensigne or troop) did commit that crime, the " Roman use was to execute every *tenth* man, in presence " of the rest; to the end the pain might fall upon *few*, and " the terror to *all*. And in such cases of cowardice, the

" generall ought to be inexorable, because severitie doth " make an armie invincible.

" But here it is to be noticed, that of *fleeing* there is *two* " sorts: the *one* proceeding of a *sudden* and *unlooked*-for " terror, which is least blameable: the *other* is *voluntary*, " and, as it were, a determinate intention to give place unto " the enemie; a fault exceeding foule and not excusable *."

2. The remaining branch of this Article regards a species of offence, similar in motive with that immediately described, and similar in the penalty which it draws after it; " the " *shameful* abandonment, or delivering up any garrison, for- " tress, post, or guard, by any officer or soldier, to whom it " may have been committed in charge, or which he shall " have been commanded to defend :"

Unlike the latter, however, in this circumstance, that it admits of a plain and simple definition, and which it has received through the medium of the Article passing under our notice. The offence described, in any and every of its features, is not of a secondary criminality, betraying the strong and indisputable signs of a common treason.

The abandonment, under any circumstances, of a garrison, fort, or post, committed in confidence to the keeping of an officer, is at all times a grievous incident of war, and sometimes an irretrievable one. In committing one or other of these to the custody of any military officer, there is a reliance necessarily had in him that he will maintain his trust to the very utmost of his military means; and the General or other commander, in consequence of such a confidence, calculates, in his general plans of operation, on the conscientious discharge of the particular trust, the observance or non-observance of which will materially assist or retard his other

* From an anonymous publication by *R. Barker*, A. D. 1602, on Justice and Jurisdiction Military—title *Cowardice*.

proceedings. The abandonment, therefore, as supposed by the Article, not only implicates the personal treason of the officer in trust; but the surrender of the national interests, with the disappointment of the views of the military chief. On the enormity of a crime of this character, it would be vain to dwell.

The treacherous or cowardly delivering up of a guard to the enemy, is of equal moral turpitude; though it may be in some cases unaccompanied with minor mischievous effects, than in the instances of the other offences to which this Article applies.

The negligent guardianship even of any military post, by any officer in trust, has always been holden as a military offence; but as it implies an absence of due caution or activity only, and not any positive want of loyalty, is inferior to the *yielding* of it up, either from *disaffection*, or *cowardice*, or without a *fit* and *suitable defence*.

Mere neglect was often followed, by the strict rule of the ancients, by death—and never suffered to pass without some striking and degrading punishment.

In the decisions of our own courts martial on this Article, a distinction has been allowed, between the loss of a post by gross negligence, and direct cowardice or treachery—as in the sentence passed on *Colonel Cockburne*, governor of *St. Eustatius*, for the surrender of that island.

The charge here was, "for *culpable neglect*, in not taking "necessary precautions for the defence of the island; and "notwithstanding he had received intelligence of an attack "intended by the enemy upon the same; and further, that "he did, on the 26th day of November, 1781, suffer him-"self to be *surprised* by an inferior body of French troops, "which landed on the said island without opposition," and concluding, "that he did shamefully abandon and give up

"the garrisons, posts, and troops, which were under his "command."

Yet as the whole matters of the particular charge resolved themselves into a complaint of *criminal neglect* solely, and not of treachery (for what British officer has been ever guilty of so base a crime?), the colonel was dismissed his Majesty's service, and not deemed deserving of the higher penalty prescribed by the Article.

It has ever been a point of honour with military men, not only to defend the post confided to them with the strictest care, but to hold it to the last extremity; and this without any reference to the political importance of the place. But it not unfrequently happens, that the highest political consequences are very nearly allied with the maintenance of particular positions. This was manifested in the late peninsular campaigns, in the obstinate defence of the garrisons of *Ciudad Rodrigo*, *Burgos*, and others, of the utmost local or temporary consideration to the French in their memorable but defeated attacks upon *Spain* and *Portugal*.

Though a siege is an isolated part of a war, it usually forms a part, and sometimes a conspicuous one of a general campaign, and at all times affords employment for a portion of an enemy's troops, far beyond those enclosed in the fort or garrison besieged. It is therefore always of consequence, that the latter be sustained to the uttermost.

The defence of a post generally holds not out a very conspicuous field for the exertion of the finer military talents and enterprize, or for any thing more than a display of fidelity, constancy, and personal resource, the more patient virtues of the soldier. Yet when these have been exhibited, they have seldom failed to attract attention and applause. But there is an instance, nearly connected with our own history, of the defence of a barren rock, which, in the very eminent qualities it called forth from the breast and mind of a gallant and en-

terprizing commander* (exemplified in how many new and daring expedients and actions?), gave to a long-protracted and almost unexampled siege, all the brilliancy and effect of a large and diversified campaign. The account of the defence of *Gibraltar*, if it deserve not a more comprehensive description and name, embracing in itself all the combined efforts of war by sea and by land, must fill one of the brightest pages of the British history, which will be proudly consulted by every soldier, whose breast expands at the tale of heroic deeds, or melts in compassion for the sufferings inseparable from them; and who will here discover a contest, a rare but happy strife, not between rival and united services, not between conflicting but congenial virtues, for the more marked exertion of courage and humanity.

The noble answer of the *Earl* of *Derby*, to the summons of *Ireton*, after the death of *Charles* the *First*, for the surrender of the *Isle of Man*, has been ever considered as in the genuine strain and spirit of military honour.

"I received (says this gallant nobleman) your letter with "indignation, and with scorn return you this answer; that "I cannot but wonder whence you should gather any hopes, "that I should prove like you, treacherous to my sovereign, "since you cannot be ignorant of my former actions in his "late Majesty's service, from which principles of loyalty "I am no whit departed. I scorn your proffers; I disdain "your favour; I abhor your treason; and am so far from "delivering up this island to your advantage, that I shall "keep it to the utmost of my power to your destruction. "Take this for your final answer, and forbear any further "solicitations; for if you trouble me with any more mes-"sages of this nature, I will burn the paper and hang the "bearer. This is the immutable resolution, and shall be

* *General Elliott*, created, on account of this most glorious service, *Baron Heathfield*, of *Gibraltar*.

"the undoubted practice of him who accounts it his "chiefest glory to be his Majesty's most loyal and obedient "subject."

What breast will not so animating a spirit fire? It communicated, in this memorable instance, to a bosom naturally tender and timid, and made it swell with a new and rare passion. The *Countess* of *Derby*, the fit wife of such a husband, catching and imitating the chivalrous spirit of her noble consort, defended this self-same island, after his death, with an admirable constancy, and according to our great historian, with great reluctance yielded to the necessity of surrendering to the enemy. This lady, a daughter of the illustrious house of *Trimoille*, in *France*, had, during the civil war, displayed a manly courage, by her obstinate defence of *Latham House*, against the parliamentary forces, and she retained the glory of being the last person in the three kingdoms, and in all their dependent dominions, who submitted to the victorious commonwealth.

When the defence of a post has eventually turned out to be unsuccessful, yet if it had been gallantly retained so long as there was a reasonable hope of maintaining a resistance, the attempt has been held honourable, and the commander and his troops have been treated with the highest respect. The garrison of *Scodra*, which, after a most strenuous and brave opposition, capitulated to the Turks, was not only freed from all imputation, but rewarded by the *Venetians* for its fidelity and gallantry.

The point of honour has been so far observed, in the keeping of a fortress, that it is related as an historical fact, that *Alphonso Perez* allowed his son, taken in a sally by the Moors, at the siege of *Tariffa*, to be slain before his eyes, rather than yield up his post.

They on the other hand, who have given up a post to the enemy without the consultation of the common expedients

for its defence, have been severely punished or contemned. The commandant of the bridge of *Charenton* was executed in 1567, at Paris, by the order of the king, for having surrendered his post on the first appearance of the Protestant army, though superior in number before it. *Augustus Cæsar* exhibited no less policy than discriminative justice, in ordering one of his commanders, with his garrison, who had given up his post without a fit defence, to possess themselves of it again, at the peril or the penalty of their lives. And there is no instance, in our own times, and by our own practice, of the delivering up of any garrison or fortress, capable of defence, but where the conduct of the party in command has undergone a strict investigation.

It would not be practicable to point out what may be expected to be done in all cases; as each may be governed by circumstances of its own. But it may be laid down as a principle, which has always obtained, that a commanding officer will not be justified in yielding up a post committed to his charge, but on *extremity*, *i. e.* when every common and devisable means of defence have been tried, exhausted, and found ineffectual. This is particularly enforced by the ordinances of *Elizabeth*, *Charles* the *First*, and *James* the *Second*, as well as by the customs and usages of war in earlier and later times.

The Articles of the *Earl* of *Essex*, temp. *Charles First*, are more explicit on this subject than any of anterior or more modern times; and may perhaps convey all that could be required of any one to offer, in elucidation of the present Article. According to these—

" If any town, castle, or fort, be yielded up, without the " *utmost necessity*, the governor thereof shall be punished " with death*.

" And withall to know in what case and circumstances a

* Article 3d.

" governor and militia of the garrison may be *blameless* for " the surrendering of a town, castle, or fort, it is hereby " expressly signified, that,—

" First—they are to *prove* the *extremity* of *want* within " the place, insomuch that no *eatable* provision was *left* " there for *sustenance* of their *lives:*

" Secondly—that no *succour* or *relief* in any *probable* " wise could be *hoped* for:

" Thirdly—that nothing else could be expected, but " that within a short time, the town, castle, or fort, with " all the garrison, and arms, and ammunition, magazines " and appurtenances belonging to it, must of *necessity* fall " into the hands of the enemy.

" Upon *proof* of which fore-mentioned circumstances they " may be *acquitted* in a council of war, else to be liable to " the punishment above expressed."

To the reasons here allowed, as justifications in the particular instances noticed, may be added the internal *weakness* of any garrison, whether in its original construction, or from injuries, sustained in the course of the siege. And perhaps it may be said, that a garrison should never be given up, without a previous consultation among the principal officers, as to the possibility of the further maintenance of the place. This may be inferred, from the incidental observation of a writer of great military experience, who says,—

" Except in the case of necessity, proved by men of " judgment, can those that surrender places to the enemy " be excused*.

ARTICLE 21st.—This Article renders all *accessaries*, whether officers, non-commissioned officers, or soldiers, liable to like punishment with the *principals*, in the cases described in the preceding Article; " who shall compel the

* *Sutcliffe.*

"governor or commanding officer of any garrison, fortress, "post, or guard, to deliver up the same to the enemy, or "to abandon the same, or shall speak words, or use any "other means to induce such governor, commanding officer, "or others, to misbehave before the enemy, or shamefully to "abandon or deliver up any garrison, post, or guard, com-"mitted to their respective charges," &c.

This Article includes two cases—*one* of direct *force* or *compulsion*; the other of *influence* or *persuasion*.

1. This amounts to a plain and palpable act of *Mutiny*, being nothing less, in effect, than the supercession, or the assumption and exercise by force, of the powers of the governor or commanding officer, by his refractory troops, and it would be needless to enter with any minuteness into the consideration of the offence.

The war ordinances of the *Earl* of *Essex* bear thus heavily on the crime;

"But if so be, that the officers or soldiers of the garrison, "constrain the governor to yield it up, in such a case shall "*all* the officers be punished with death; and the common "soldiers who have been active or have given their consent "in constraining the governor, shall cast lots for the hang-"ing of the tenth man amongst them."

2. The crime here, is not of the same bold and open quality as in the former instance.

The offence consists, as it is shewn, in the use of speeches or other means to induce the governor or commanding officer or others, to misbehave before the enemy, or shamefully to abandon or deliver up any garrison, &c. &c. *i. e.* they must have a tendency to influence or persuade those to whom they are addressed, to forsake their duty, and to betray the interests of the State.

The speeches or means used, in so far as they have relation to a *governor* or *commanding officer*, must, in order to

render them criminal, to the extent implied in the Article, be not only *unwarranted* or *unauthorized,* but dictated of the mere will of the inferiors, and with a view to influence the conduct of the superior, to the betrayal of his duty.—But itwould be otherwise, if such speeches or means are used on authority previously given, in a fit place, or proper occasion and proceeding from honest motives, as in the instance, where officers are summoned to a council of war, and are desired to give their advice in times of difficulty, and peculiar urgency. Words spoken, or measures recommended, in these emmergencies, and under this sanction, cannot in any light involve a crime.

But speeches, or means used to induce *others* to misbehave before the enemy, or to bring on the other consequences specified in the Article, cannot be considered at any time, but as in the highest degree criminal; in as much as soldiers, in every part of their duty, can only act under the order of their military commandant, and any advice or counsel to contravene such authority, or to persuade men to act in opposition to it, in the consultation of their own will, though under the specious cover of the supposed general or public interests, is a flagrant and mischievous offence, in subversion of the first principle of military authority, shaking in every possible instance the confidence of the troops in the acts of the general, and damping their energies in the execution of the duty commended to them. For soldiers to throw out their own counsels among one another, or to spread their own fears, during the progress of any public service, has ever been accounted an act of great culpability.

Thus it is noticed in the early compilations of military laws, that

"Whosoever yieldeth a towne or fort to the enemy, or "*motioneth* any such matter, but upon *extremity*, and *that*

" to the *governor* or in *councill*, let him be executed as a " traitor."

Here the only ground of exception is expressly stated, as in an anterior place.

The ordinances of the *Earl* of *Northumberland* are almost in the same words.

The very speaking of surrender, so as to familiarize the ear of the military, to so mean and so unsoldier-like an advice, or the recommendation of a parley to learn the terms which the enemy might be willing to concede, unless in a council of war, has been always regarded criminal; as having an effect to daunt the courage and constancy of the troops; and possibly to bring about an event which has been often turned to the surprise and capture of the besieged fortress.

It has been confidently laid down by a military writer of eminence,—" That it is not lawful without cause, mani- " fested to the *counselle*, so much as to *parley*, or *motion* " any composition with the enemie." And he instances, that " the woemen of *Athens* stoned *Cirsilius* to death; for that " he went about to persuade the townsmen to yield to the " *King* of *Persia*. And after the death of *Cyrus*, when the " *Greeks* that went with him, being farre from their country, " were in distresse, one *Apollonides*, despairing of other " means, would have had them yield themselves to the " mercie of the enemie; his speech seemed so unworthy " the profession of a soldier, that he was there disarmed " and like a base-minded beast, laden with baggage."

This seems to have been a common method of punishing offences of this description by the ancients, for we read, that the *Emperor Constantius* decreed, that if a soldier, captain, or leader, did utter any word, sign, or voice, to encourage the enemy, that for so doing he should be bound in chains,

and be led as a beast, wheresoever the army might be ordered.

In the degrading nature of the punishment, we perceive the opinion entertained of the baseness of the crime.

It has been before observed, that the offence is the same, and of equal criminality, whether the speeches or means, having the tendency supposed by the Article, be used towards the commanding officer, or the officers or troops under his command; since in the *first* instance, they have an immediate interference with his authority, and a bearing on the freedom of his action; and in the *second*, induce a want of confidence in the commander, an irresolution amongst the *soldiery*, and a contagious cowardice, that might be productive of the worst evils. For these considerations it cannot be wondered that so signal an offence should have been so severely treated in former times, and in our own.

SECTION THE FIFTEENTH.

Rank.

THE rank, or precedency that certain officers or corps are entitled to, bear, or maintain of themselves, and in respect to others, when doing duty with them, are succinctly laid down in the present section.

ARTICLE 1st.—This has relation to officers having *brevets*, or commissions, giving them rank of a prior date or place in the King's army, generally, beyond what they are entitled to hold in their particular regiments. The Article provides, that such officers, when on service on courts martial and on detachments, when composed of dif-

ferent corps, shall take place according to the rank given them in their brevets, or dates of their former commissions: but, in the regiment, troop, or company, to which such brevet officers belong, they shall do duty and take rank, both in courts martial, and on detachments, which shall be composed only of their own corps, according to the commissions by which they are mustered in the said corps. In other words, brevet rank or command, for they are mutuative terms, is dcelared to be effectual for every military purpose in the army at large, but of no avail in the regiment to which the officers holding it belong; unless it shall in all or in part be mixed or united for a temporary purpose, with some other corps.

ARTICLE 2d.—The command of an united body, consisting of the King's life guards, or horse guards, is adjusted or settled by this Article; which declares that the joint forces, whilst they continue to do duty together, or while they remain in the same quarters, shall be commanded by the eldest officer by commission on the spot; the said forces being considered and to be taken as one whole, or a single corps. There is a saving however, from the general command, conferred on such senior officer present, of the particular ranks which the respective corps are relatively entitled to hold to one another, and the posts they usually occupy.

ARTICLE 3d.—This Article regulates that when the last-mentioned corps or the King's foot guards shall happen to march with or be encamped or quartered with any bodies or detachments of his Majesty's other troops, the eldest officer, without respect to corps, shall take upon him the command of the whole, and give the necessary orders for conducting the public service.

ARTICLE 4th.—When the regiments, or detachments from the regiments of life guards, purely, shall do duty to-

gether, they are to be deemed as one corps, and the officers, by virtue of this Article, are to take rank and do duty, according to the commissions by which they are mustered.

ARTICLE 5th.—The same regulation is declared, as in the latter case, for the government of the regiment of foot guards, or detachments from the same, when on duty together, unmixed with other corps.

ARTICLE 6th.—The relative rank of officers, of the king's regular army, with the officers of other descriptions of troops, is settled by this Article: which, after stating the right of the officers of the militia by a special provision of parliament, to take rank as the youngest of their degree, with officers of his Majesty's service, provides, that such latter officers shall in like manner have precedence of, and command the officers, of equal degree, of the king's fencible forces, yeomanry, cavalry, and volunteer corps—And that the officers of the militia, and of the several last-mentioned corps, shall rank together according to the dates of their respective commissions.

ARTICLE 7th.—This Article provides, that, notwithstanding the regulation contained in the preceding Article, when the commissions of the officers of the king's fencible corps shall be dated on or before the 25th day of July, 1798, that such officers shall continue to rank, according to the dates of their respective commissions, with the officers of the regular forces, of equal degree; except when the former be acting in conjunction also with officers of the militia: in which case, if the commission of the fencible officer be of junior date to that of the militia officer of the same degree, the regular officer of equal rank, though his commission be of junior date to that of the fencible officer, shall have precedence of and command both.

The first provision of the Article saves the right of relative rank, which the officers of fencible corps, of the date

specified, were, from the original constitution of those corps, entitled to hold with officers of the king's regular service, when doing duty together. This, however, relates only to a joint service carried on between regular and fencible corps, unmixed with others; a distinct case, and distinctly provided for. But on a more general or extended service, where the fencible force may be united with militia as well as regular troops, another rule prevails, resting on legislative authority, having relation to the respective rank of officers of the militia and the fencible corps, to one another, and of the regular officers to each respectively, which renders the previous rule, as respects regulars and fencibles only, inapplicable, or impossible to be acted on, without the introduction of infinite confusion, and the destruction of pre-existing regulations. For if a senior officer of militia, from the date of his commission, should command a fencible officer of the same rank, which by the 18th of *George* the *Third*, cap. 59, he is entitled to do, when fencible and militia corps serve together, he might command an officer of his Majesty's regular army, with a commission of a date posterior to that of the fencible officer, of equal degree, serving in conjunction; which in all cases he is precluded from doing, by the parliamentary provision in that behalf, stated in the 6th Article of the present section, placing the militia officer as youngest of the degree of the king's regular officers with whom he may be employed; so that without some especial provision, as here, there would be three distinct rights to command—1st, of the militia officer to command the fencible officer—2d, the fencible officer to command the regular officer; and third, the latter to command the militia officer—all of which separate rights are incompatible with and at variance with one another. To obviate this evil, and to establish a simplicity in command, this Article has been framed; which annuls, for the sake of uniformity, the right of command, ac-

cording to the date of his commission, of a fencible officer, on common service with an officer of his Majesty's regular army, when there shall happen to be joined to them any body of militia, and whilst they shall continue acting together.

The regulations, contained in the preceding Articles, are not only calculated to adjust the relations of officers in certain extraordinary situations, of rare and temporary occurrence, which otherwise might produce some occasional inconvenience to the public service; but have the further good effect of removing all doubts, as to the resulting right of command, and thereby demonstrating to all concerned the paramount authority present with the military body—the obedience which it exacts, and the responsibility which it may incur from the negligent or improper exercise of it.

SECTION THE SIXTEENTH.

Administration of Justice.

THE Articles, of which this Section is composed, may be said to have, generally, an appropriate title; most of them referring to the means and modes of distributing justice to the military community, though some, comparatively few, relate to the declaration and definition of crimes, which may lay the foundation for judicial interference and proceedings. With the former, as they have been treated at large by several authors, among whom are *Adye*, *Tytler*, and *Mc Arthur*, who have written expressly and *specifically* on the subject, I can have little more to do, than to follow the detail of the

Articles in serie; in describing the rules, established for the promotion of the important objects they have in view—whilst, of the latter, as they fall more particularly within the province of my undertaking, and as they have not, perhaps, been hitherto adequately explained, I may be expected to take a less summary notice.

ARTICLE 1st.—This Article prescribes the number of members of which a general court martial in *Great Britain* or *Ireland*, shall be formed—which in no case is to consist of less than *nine* commissioned officers: and if held for the trial of a *commissioned officer*, of not less than *thirteen.*

The *president*, to be *not* under the degree of a *field officer;* and the commander in chief, or governor of the garrison, where the offender shall be tried, is expressly excluded from filling such office. This is said, by some, to have been ordained for the purpose of preventing the influence of officers of this high station on the proceedings of the court martial—but it would rather appear to have been dictated by a more obvious reason; the prevention of that officer's being involved in incongruous and conflicting duties; in the direction of the prosecution, the trial of the offence ordered to be prosecuted, and the ultimate sanction of the sentence—which latter act would necessarily involve a sitting in judgment on his own previous conduct.

ARTICLE 2d.—The preceding Article having fixed the number of members that shall constitute a general court martial in *Great Britain* or *Ireland*, the present one completes the arrangement, by adjusting the number, of whom it may be formed, elsewhere; ordaining, that in the garrison of *Gibraltar*, or in any other place beyond the seas, it shall not consist of less than *thirteen* officers for the trial of any *commissioned* officer—And for the trial of a *non*-commissioned officer or soldier, of not less than *nine;* except the

court martial, for the latter purpose, shall be holden in some place out of the king's dominions, or the settlements of the united company of merchants trading to the *East Indies*, in which case it may consist of any number of commissioned officers, not less than *seven*; and if it be holden in *Africa* or *New South Wales*, the court may consist of any number of the said officers, not less than *five*; the president not to be under the degree of a field officer, unless when a field officer cannot be had; and then, not in any case under the degree of a captain. The officer commanding in chief, and the governor of the garrison, as in the foregoing case, is excluded from sitting as president.

In the King's own dominions and the settlements of the *East-India* company, the Article supposes that there is a sufficient number of officers to form a court of the greater extent.

ARTICLE 3d.—To remove doubts, as to the force of the Articles contained in the present Section, it is recited, that they are to be observed by, and do in all respects regard the King's regiments of life guards, horse guards, and foot guards; as well as his Majesty's other forces. And for the prevention of disputes which might arise between the officers of the said different descriptions of guards, in relation to their holding courts martial, and upon other points of duty, it is declared by this Aricle to be the King's will and pleasure, that when any *officer* or *soldier* of the said *regiments* of *life guards*, or *regiment* of *horse guards*, shall be brought before a general court martial, for differences arising purely amongst themselves, or for crimes relating to discipline, or breach of orders, such courts martial shall be composed of officers serving in *any* or *all* of those corps of life guards and horse guards (as may be most conveniently assembled), wherein the officers are to take post according to the dates and degrees of rank granted in their respective commissions,

without regard to the seniority of corps, or other formerly pretended privileges.

ARTICLE 4th.—This Article makes a like provision with the last, in respect to the officers of the *foot guards;* ordaining that, in the like cases, where the differences or crimes concern the members of their own corps, the officers of such corps shall of themselves compose the court martial by which they shall be investigated and tried; and that the said officers shall take rank according to their commissions: but if the disputes or differences concern others, whether *life* guards, or *horse* guards and officers or soldiers belonging to the foot guards; or if they happen to arise between any of the aforesaid officers or soldiers, and those of any other of the King's forces; the court martial to be appointed in such cases shall be equally composed of officers belonging to the corps of which the parties complaining and complained of, do then serve; and the president to be taken by turns, as nearly as the King's service will, with convenience, admit, and so in course out of other corps according to their seniority in rank.

The effect of this and the preceding Article is, to bring the conduct of supposed offenders belonging to the peculiar corps named, who are generally stationed in one place, and under circumstances, not common to the other branches of the army, within the cognizance of judges, who must be better able, from peculiar personal as well as local information, than strangers, to decide in the premises.

ARTICLE 5th.—As the service of the militia is of a distinct kind, and governed by other customs and rules than those of the regular army; it has been thought expedient by this Article to declare, that no officer of the former service shall sit on any court martial upon the trial of any officer or soldiers of the King's forces; and for a like reason, the of-

ficers of the King's service are precluded from sitting on the trial of any officer or soldier of the militia.

ARTICLE 6th.—This contains little more than a repetition of the first Article of the foregoing section. It declares, that the members of general and regimental courts martial, when belonging to different corps, shall take the same rank which they hold in the *army;* but when they belong to one corps, their rank in respect to one another shall be governed by the date of the commissions, by which they are mustered in that particular corps.

ARTICLE 7th.—The judge-advocate-general or his deputy is empowered by this Article to *prosecute* in the *King's name*, and there is a marginal reference to the Article, stating that he is to *inform* also; which I conceive to intend, if it hath any application here, that the judge-advocate may, of himself, originate any charge, or give the court martial to understand, or be *informed*, of any crime or misdemeanor, affecting the interests of the Crown, in order to its being investigated before such court.

The Articles of *James* the *Second*, from which many of the Articles now in force have been almost *verbatim* copied, have a provision to this effect;

" In all criminal causes which concern the Crown, his
" Majesty's advocate-general, or judge-advocate of the army,
" shall *inform* the court and prosecute on his Majesty's
" behalf." Article 52.

The attorney-general, in respect to civil crimes and misdemeanors, is furnished also with a similar authority, and which he is in the habit of using, of his own motive, on a private knowledge or assurance of the existence of any subsisting offence, calling for so summary a course of proceeding.

There are others who give a different construction to the word "inform," as used in this place; contending, that it

implies a distinct duty of the judge-advocate—viz.—" *that* " of *instructing* or *counselling* the court, not only in matters " of *essential* and *necessary form*; but in explaining to them " such points of law as may occur in the course of their " proceedings, and with respect to which the Mutiny Act " and Articles of War may be silent*."

It would be unbecoming, on a hasty examination, to decide whether the one or the other construction be the correct one.

The Article having cast the important duty of prosecutor on the judge-advocate or his deputy, proceeds to detail another part of his duty, following the provision of the Mutiny Act in that behalf, *i. e.* in all trials of offenders by general courts martial, that he shall administer to each member the oaths prescribed in the said act, and which are set forth in *hæc verba* in the Article.

The Article concludes with directing, that as soon as the said oaths shall have been administered to the respective members, the president of the court shall administer to the judge-advocate, or person officiating as such, the oath enjoined by the said Act to be exhibited to such last-mentioned officer, and which is also set out in the said Article at length.

ARTICLE 8th.—All members of a court martial are hereby required to behave with decency; and are instructed of the manner in which they are to vote on all questions that may arise, *i. e.* they are to begin from the youngest.

ARTICLE 9th.—This Article ordains, that no *sentence* of *death* shall be given against any offender by any general court martial, consisting of less than thirteen members; nor unless nine members shall concur therein; except the said court martial shall be holden in any place beyond seas out of the King's dominions, or out of the settlements of the *East-India* company, or in *Africa*, or *New South Wales*; nor

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* *Tytler*, p. 352.

shall such sentence be given in *any* case, when a court martial shall consist of *more* officers than *thirteen*, or, in the cases specified, where it may consist of a *less* number, without a concurrence of *two-thirds* at least of the officers present.

ARTICLE 10th.—No field officer, by the regulation announced in this Article, shall be tried by any person under the degree of a captain; nor shall any proceedings or trials be carried on, but between the hours of eight in the morning and three in the afternoon, except in cases which require an immediate example.

ARTICLE 11th.—This respects the execution of the sentence that may in any case be passed by a general court martial, and enjoins, that no sentence of such court shall be put in execution, till after a report shall have been made of the whole proceedings to the King, or to the officer commanding in chief, or some other person duly authorized by the King under his sign manual to confirm the same, or until his Majesty's or his directions shall have been signified thereupon.

This is to allow of the merciful interposition of the Crown, or of the person exercising in its behalf, this almost divine prerogative, in a case of nicety in the law applicable to the facts constituting the crime, between the judge and the criminal, for abating the severity of the sentence. If it had been of mere delay, for the purpose of reconsidering the proceedings, it would have been a wise and commendable respite for;

"Nulla unquam de vitâ hominis cunctatio longa est *."

ARTICLE 12th.—By this Article the commissioned officers of every regiment are authorized, by the appoint-

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* Our great critic thus metrically translates the line of the Latin poet,—

"For when man's life is in debate,
"We can't too long deliberate." *Johnson*,

ment of their colonel or commanding officer, without any special warrant from the King, to hold regimenal courts martial, for inquiring into and for inflicting corporal or other punishments for *small offences*, and are to give judgment by the majority of voices; but no sentence to be executed, and for the same reason as in the preceding case, until the commanding officer (not being a member of the court martial) or the governor of the garrison, shall have confirmed the same.

ARTICLE 13th.—The number of members to constitute a regimental court martial are fixed by this Article, which establishes that it shall not consist of less than *five* officers, except in cases when that number cannot be conveniently assembled, when *three* are declared competent; who are to determine on the sentence by the majority of voices. The sentence is to be confirmed by the commanding officer, not being a member of the court, before it be carried into execution.

ARTICLE 14th.—This Article relates to certain extraordinary cases which are therein specially provided for. It empowers every governor or commander of a district, garrison, fort, castle, or barrack; and the commanding officer in any town or place, where the officers consist of detachments from different regiments or independent companies, and where there is *not* a sufficient number of officers of the corps to which the person to be tried belongs, or in which the criminal matter in question happened, to form a regimental court martial; also every officer commanding a regiment or battalion formed of detached troops or companies, from different corps, to assemble courts martial composed of the officers under their respective command, although of distinct corps; and such courts martial to have the like powers, and proceed in the like manner as regimental courts martial, and their sentence to be subject to the

like confirmation, and under the like restrictions, as the former.

ARTICLE 15th.—This and the two succeeding Articles lay down the method of proceeding on the trial of warrant officers, and matters incidental thereto, commencing with a declaration, that the situation of such officers, in regard to their liability to be tried otherwise than by a general court martial, had not been hitherto defined. The Article then directs, that in all cases of alleged offence against any warrant officer, if it be not of so heinous a nature as to require investigation before a general court martial, such officer is to be tried by a detachment court martial, to be appointed by the General commanding the district, where the corps of such officer is, if in *Great Britain, Ireland,* or the circumjacent islands; and elsewhere, beyond the seas, by the General commanding in chief on the station; which detachment courts martial are to proceed in the manner of regimental courts martial;

ARTICLE 16th.—Provided, that such detachment court martial, as mentioned in the preceding section, shall not consist of not less than five commissioned officers, of whom not more than two shall be taken from the regiment to which the warrant officer to be tried belongs; the president not to be under the degree of a field officer: that not more than two of the other members be under the degree of a captain; and no sentence of such court martial to be put in execution, if the trial shall have taken place in *Great Britain,* or the adjacent islands, until his Majesty's directions be had thereon, through the commander in chief of the King's forces or (in his absence), thes ecretary of war, or if in *Ireland,* or in any of the King's dominions beyond seas or foreign parts, until the sentence shall have been confirmed by the General commanding in chief on the station; who is authorized by the Article to cause the sentence to be executed,

suspended, or remitted, as he shall judge best, and most conducive to the good of the King's service, without waiting for his Majesty's further orders;

ARTICLE 17th.—Provided also, that no court martial shall have authority to award corporal punishment in any case of a warrant officer, nor shall he be liable to be reduced by the sentence of a general or detachment court martial, to serve in an inferior situation, unless he should have been originally enlisted as a private soldier, and should have continued in the service, until his appointment to be an officer by warrant.

ARTICLE 18th.—This and the immediately succeeding Article are founded on the authority of the Mutiny Act, and were inserted in the present Section so late as the year 1805. They are introductive of a most important change in the constitution of regimental courts martial, and in the solemnity of their proceedings; by putting them on the same footing, in respect to the swearing of the members and witnesses, with general courts martial. Until the passing of the Act in question, neither the court nor witnesses were holden by the obligation of an oath.

The principal reason alleged, for the innovation, was, the assumption by regimental courts martial of a cognizance, from misconceiving or misnaming offences, to give a kind of legal colour to the entertainment of criminal causes, far beyond their original and intended jurisdiction: thus *desertion*, according to the mover of the new clauses, had been styled "*absence* without *leave*," and *Mutiny*—"*unsoldierlike* "behaviour."

The more natural course, it seems, would have been, to have restrained the regimental court martial in its excess of jurisdiction; rather than to have legalized, as it were, such excess, by affording legislative means to continue it; but, it is true, under some additional security. It is more to be

wished, that a restraint had been recommended; as an alteration, with the view taken of it, must be understood to interfere with the provision of the legislature, and the policy of the law itself, in giving the jurisdiction over the higher classes of military crime to the inferior military courts.

Exceptions were taken to the clauses in question, in their passage through the different houses of parliament, in that they would have the effect of increasing the severity of the sentences of regimental courts martial, from their being passed under the obligation of an oath, which would be binding on the consciences of the members of such courts, when, if they were left as they previously stood, they would be more noticeable, as they had been found in practice, for their lenity rather than severity. But this admits an imperfection in a regimental court martial, which should disqualify it as a court altogether; in as much as it assumes it capable of acting from feeling, rather than principle, or on an unsound sense of duty, and could not at any rate be an answer to the objection, arising out of the assumption of the court of a higher jurisdiction than it was entitled to exercise; and, of consequence, to diminish the degree of criminality of several offences, and the punishment assigned to them by the deliberate wisdom of the legislature. If such a principle could be acted on, it might sanction, by the extended application of it, an encroachment of the ordinary courts of sessions, by similar fictions, on a body of crimes, which for the safety of society, and of individuals who might be guilty of them, are reserved for the judgment of the courts of assize, or the King's supreme courts in Westminster-hall.

It is not insinuated, that the introduction of oaths, to be administered to the members of such courts martial, and the witnesses to be examined before them, is not an amelioration of the law military; for it would seem contrary to every notion of justice, and the whole tenor of our judicial sys-

tem, that any one should be adjudged, to the slightest possible punishment, without a grave and solemn establishment of his guilt, and which alone could be satisfactorily made out, through the intervention of judges sworn to do justice, and witnesses sworn to speak the truth.

The real and only complaint was not, as has been stated, so much against the former constitution of regimental courts martial as the practice of such courts, in amplifying their jurisdiction, of their own authority, and thereby often inflicting punishments of a heavier severity than they appeared warranted in awarding.

Now to have remedied this, it would only have been needful, either to have restrained the assumed jurisdiction of such courts, or to have limited the extent of punishment which they should at any time be permitted to adjudge; instead of countenancing, in an indirect way, the exercise of the powers of a superior court, by an inferior one *.

Though there be no great cause, as it should appear, for admiring either the reason on which the new clauses in the Mutiny Act proceeded, or the manner in which the remedy they had in view, has been forwarded by them; it is impossible to withhold commendation from the motive in which they originated. They have had, too, the happy effect of directing the attention of the highest military authority to the subject, and have introduced in practice, on the humane suggestion

* It is said, by *M'Arthur*, and there is justice in the observation, that should a non-commissioned officer or soldier be brought before a regimental court martial for mutiny, desertion, or any of the higher crimes cognizable by a general court martial (*i. e.* if charged iisdem nominibus, with the same names, and characters given to them in the Mutiny Act, or Articles of War), he might not only plead the incompetency of the regimental court martial to try him; but should this regimental court martial, even without a soldier's availing himself of such plea, proceed in the trial, and adjudge a punishment for a crime not within the jurisdiction of the court, the members would collectively and individually be liable to a prosecution in a court of justice for the illegality of their proceedings. Vol. 1, p. 158.

of that authority, in the shape of an universal recommendation, tantamount in military consideration to law, if not a prescribed, an *understood* and expected measure of punishment, not in any case to be exceeded.

But to return to the Article. It prescribes, as it will be seen, the oaths, which the members of all courts martial (other than general courts martial) are bound to take, and the mode of administring of them to the ordinary members, through the medium of the president. And when this essential act shall have been duly executed, it directs, that any one of the members sworn shall administer the said oaths to the president; and the president of such courts martial (not being under the rank of a captain), shall be appointed by the commanding officer of the regiment detachment, or brigade, or the governor or commander of the garrison, fort, castle, or barrack, directing such court martial.

ARTICLE 19th is a general regulation, directing that all persons who give evidence before a general court martial, shall be examined on oath.

ARTICLE 20th.—This Article relates to the cashiering or dismissing of officers, non-commissioned officers, and soldiers, from his Majesty's service, and ordains, first, that "No commissioned officer shall be cashiered or dismissed "from the King's service, except by an order from his Ma-"jesty, or by the sentence of a general court martial, ap-"proved by the King, or by some person having authority "from his Majesty, under the sign manual:" and, secondly, that "Non-commissioned officers may be discharged as "private soldiers, and by the order of the colonel of a "regiment, or, by the sentence of a court martial, be re-"duced to private sentinels."

Cashiering and *dismissal*, as here used, may be taken in a fair or honourable sense, as well as a discreditable one.

Grose derives *casiered* from the French term *cassé*, signifying, disbanded or discharged, which did not mean originally, as he explains, any thing ignominious, as it now does.

The above definition is fortified by an ordinance of the *Earl* of *Northumberland*, in the time of *Charles* the *First*, viz.

"No captain shall *casseer* a soldier enrolled, without warrant of the lord general."

Dismissal from the common meaning of the term, does not necessarily imply any thing derogatory.

But to consider briefly the different branches of the Article, applying to the cases of commissioned, and of non-commissioned officers and soldiers.

1.—As to *commissioned* officers—the first arm of this branch of the Article asserts a right in the King, only, and not in any other to cashier or dismiss such officers, at his pleasure, *i. e.* to remove them from his service, by his mere order, and without previous trial or inquiry; an act, of itself, not necessarily inferring any disgrace or discredit; whilst the other arm or branch of the Article intends a cashiering or dismissal, of a contrary character, viz. by the *sentence* of a court martial, duly approved.

2. As to non-commissioned officers and soldiers.—The first division of the latter branch of the Article, following the order of the foregoing branch, refers to a simple dismissal of non commissioned officers from the ranks of the army, dissolving the obligation of military service, returning such non-commissioned officers into their original class, the undistinguished number of citizens, and implying no manner of stigma; the term used in the Article, excluding the possibility of a conclusion to that effect. This part of the Article briefly says—that "*Non-commissioned officers* may be *discharged* as *private soldiers*, and by the order of the colonel of the regiment," "*as* private soldiers," means, either *like* private soldiers, or under the denomination of private sol-

diers, or in the same manner as private soldiers; whom the colonels of regiments, for good and sufficient cause apparent to them, are authorized to discharge.

The second division, of the latter branch of this Article, states, that non-commissioned officers, may by the *sentence* of a *regimental court martial*, be reduced to *private* sentinels; in other words, may be *degraded*, a totally distinct act from being *discharged*.

Tytler, in speaking of this Article, or in reference to it, observes, but certainly not with his usual accuracy— "This power of degrading a non-commissioned officer, to "the rank of a private sentinel, resides at all times in the "commanding officer, or colonel of the regiment, and can "be exercised of his own authority, on sufficient cause, "without the intervention of a court martial*".

But, if I have rightly understood, and fairly represented the Article, under consideration, it is manifest, that the colonel, of his own authority, can only grant a discharge to such non-commissioned officers, and that they cannot be degraded, for so it is expressly shewn, by any power or authority, short of the sentence of a regimental court martial. And I am happy, in the difficulty in which the exercise of this power might be involved, from the credit usually attached to the dicta of this learned writer, to find, that the construction I have put on the Article, is sustained by the decision of an authority of great weight and reputation in the military profession. *Lieutenant-General Dundas*, in giving his opinion on the case submitted to him by the general court martial, assembled for the trial of *Serjeant Ginger*, thus delivers himself—

"I have to signify my concurrence in opinion with the "court, that there is not any *competent* regimental authority,

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* *Tytler*, p. 318. 3d edition.

" by which a *non-commissioned officer* can be *degraded*, un-
" less by the *sentence* of a *court martial**.

It would be vain, as well as presumptuous, to add a word to this clear and plain proposition.

ARTICLE 21st.—It is enjoined by this Article, that "no person whatsoever shall use menacing words, signs, "or gestures, in the presence of a court martial then sitting, "or shall cause any disorder, or riot, so as to disturb their "proceeding, on the penalty of being punished at the dis-"cretion of the said court martial."

Whether this Article be founded on the usages and customs of war, or the necesity of the thing, or on the special delegated authority conveyed by the legislature to his Majesty, to make Articles of War for the government of the army, it might be more nice, than useful in this place, to investigate at length.

Without some such power as is communicated by this Article, it would be impracticable, it should seem, for courts martial to conduct their proceedings with due order and dignity. It is known, that from the earliest times, the interruption or disturbance of the courts military, in their deliberations, or in the acts, advised or adjudicated by them, have been considered as offences of a very grave character, and have been punished, in aggravated cases, with the highest penalty.

"No man," say the ordinances of the *Earl* of *Northumberland*, "shall presume to use any *braving* words, *signs*, or "*gestures*, whilst the *court* of *justice* is *sitting*, upon pain of "*death*."

And there is an Article, awarding the like penalty, among the ordinances of the *Earl* of *Essex*, to any one, "who shall by word or gesture, shew his contempt and "misregard, or shall fall out in boasting and braving, whilst "courts are sitting."

* See appendix, No. v.—vol. 1 *Mc Arthur*, p. 362.

The Articles of *James* the *Second* leave these offences to be punished at the discretion of a court martial, but award the *last* penalty, or such other as the court martial may judge fit, to those, officers or soldiers, who shall presume to hinder the provost marshal, the principal executive officer of such courts, or his lieutenant or servant, in the execution of their office; without reference to the importance, or otherwise, of the act on which they may be employed.

It has been for centuries the practice of courts martial to exercise a summary jurisdiction in contempts, touching the Acts described, committed in the face of the court, or in resistance of the Acts, ordered to be executed under the sentences of such courts. It may be presumed from a single circumstance, that such a power is necessary to the regularity of the proceedings of such courts, and to the protection and vindication of its dignity; or otherwise their sittings might be disturbed, and their judicial acts contravened with impunity; for in foreign countries, the usual field of the active services of the army, there is an absence, almost universally, of the civil courts, which could alone, supposing that the power of punishing contempts of the description specified were wanting to courts martial, take cognizance of, and punish such offences. And it will hardly be contended, that they should pass with impunity.

But as the Article proceeds out of the single authority of one of the branches of the legislature, it cannot be supposed to be binding on the subject generally, or on any other than those belonging to the military society, for which his Majesty, by virtue of the Mutiny Act, has the sole power of legislating, in cases therein unspecified, of which this is presumed to be one.

This Article acknowledges an authority in courts martial, or gives such authority to them, to punish contempts in a

summary manner; but it is to be noticed, that the contempts specified are of a public nature, and supposed to be committed in the presence or face of the court, and therefore not requiring, in order to mark them out for reprehension, any ulterior investigation.

Without entering into any wide inquiry, whether a court martial, like the superior courts, has an inherent power in it to punish contempts, which might lead to a very extended argument, I shall be content to consider the power, for it is sufficient for the present purpose, as if it were newly conferred by the Article under reference.

It has been shewn in preceding places, that the king has ample authority given to him by the Mutiny Act for making Articles of War, for the better government of the forces; among which may be included Articles, as of course, for the due administration of the law military, through which alone the government of the forces can at any time be enforced. For the law military would be a dead letter, if there were not some appointed means of administering it regularly and effectually.

If the legislature had power, which will not be doubted, to frame a regulation, of the like effect with the present Article; the Crown, from the right of legislation deputed to it in the cases and to the extent specified by the Mutiny Act, has the like right which it has exercised in this Article, declaring it to be a crime to be punished summarily in any one, who shall disturb, in the way described, the proceedings of courts martial.

The legislature has left it almost wholly to the Crown to form the rules for conducting the judicial proceedings of courts martial, and in all cases, unprovided for in the Mutiny Act, to make laws declaratory of military crimes and offences, so that they do not endanger the life or limb of the offenders.

Now as to the offences declared by this Article, superior courts have at all times a power inherent in their constitution, of punishing them in a summary way. And other courts, not of superior jurisdiction, such as the court of admiralty, which proceeds, for the most part, on the principles of the civil law, like the court military, has exercised the right of fine and imprisonment for contempts in the like cases; founded, as *Blackstone* says, on immemorial usage, grounded on the necessity of supporting a jurisdiction so extensive, though opposite to the usual doctrines of the common law.

The same reasons might be urged, if it were requisite, in favour of the like jurisdiction in courts martial; for it has been exercised time out of memory, and the necessity of sustaining it may be seen by a glance, at the large and most important interests that are involved in it; not the internal government alone of a body of men, peculiarly and hazardously constituted; but the maintenance in foreign countries, of the relative peace and quiet of surrounding countries, which it is always wise and sometimes obligatory to cultivate. In the latter case, it is manifest, if the court had not within itself the power and authority claimed, it could not receive any borrowed aid, if it should be necessary, from any other local jurisdiction.

It might, without much difficulty, be shewn, that courts martial, from the earliest times, have not only punished contempts, committed in the face of those courts, to the extent authorized by this Article, but that they have visited them, under certain circumstances, with the severest possible punishment; and that the provost marshal, of his mere authority, and without waiting for the warrant of any superior, has been allowed to seize the person of the offender, in order to his punishment.

But it is not necessary to enter into the antiquity of the

practice, the grounds on which it is founded, or the necessity of it, considered of itself; since it is sanctioned here, as it has been shewn, by positive law—which his Majesty has been advised to declare, by the power vested in his hands, under the authority of parliament.

As the Article in question is founded on the authority last mentioned, it cannot exceed the limits prescribed for it; that is, it cannot authorize any punishment for contempts, be they of what character they may, which may extend to life or limb.

This observation has been offered from a consideration of the severity, on certain occasions and times, with which high contempts of this nature have been dealt with, as has been heretofore shewn.

It is not intended to be asserted, that a violent and tumultuous proceeding in a court martial, to the obstruction of the deliberations of the court, and in contempt of the authority under which it is acting, might not be attended, under circumstances, with the highest possible punishment; it is contended, only, that it could not be punished directly and in the summary way, directed by this Article. Such a crime has all the quality of Mutiny about it, and would be to be prosecuted, under a distinct charge, and in the ordinary course of an offence of that degree of criminality.

The punishment to be awarded to the offence, is at all times in the breast of the court, and must be governed by the quality of the crime. It may be attachment, close or more liberal confinement, reprimand, or any other minor punishment, in relation to *officers*, and in respect of *privates* imprisonment, or corporal chastisement, or both; and any of these may be adjudged, without the previous form of trial; the offence being committed under the eye of the court, and incapable of being more clearly or satisfactorily proved. Still, however, it would be incumbent on the court to hear

what the offender had to offer in excuse, being in *misericordiâ*, and under a contrition for his acknowledged offence.

On the trial of *Colonel Geils*, at *Madras*, *Captain Ulick Burke*, of the coast artillery, interrupted the defence by some offensive and intemperate observations on what the prisoner was then urging in his excuse, which the court considered as a contempt towards itself, and ordered the party using such expressions, under an immediate arrest. Before the court broke up, *Captain Burke* prayed to be admitted to the presence of the court, where he apoligized for his conduct to the court, and to the prisoner, and after a slight admonition and reprimand, was discharged of the contempt.

At other times the court has thought proper, after placing the party in arrest, to prefer a specific charge against the alleged offender—to be tried afterwards by a court martial, other than that before which the offence was committed. This was done in the case of *Major John Browne*, of his Majesty's 67th regiment, for a contempt committed in the face of a court martial, holden at *Antigua* at the beginning of the year 1786, for the trial of *Captain Hedges*, on the prosecution of the said *Major John Browne*.

The latter in the course of the proceedings on the prosecution, threw out some observations on the conduct of one of the members of the court, which were holden to be contemptuous, and thereupon the Major was ordered into arrest.

The Major questioned the authority of the court to put him in arrest, being composed of members, saving the president, of rank inferior to himself, and said he would submit to the arrest, only, because it was imposed by *Lieutenant Colonel Foster*, the president, the acknowledged senior of *Major Browne*.

The court in adverting to the conduct of *Major Browne*, thus observed upon it:—

"The court cannot but express their surprise, that a

"doubt should have been entertained on the point (the "arrest), but since their attention had been directly called to "it, they take this opportunity of declaring their opinion, "that *all* courts martial, *legally constituted*, and *convened* for "the *administration of justice*, have, while *acting* in the *discharge* of their *duty*, *equal* powers and *authority* for the "purpose of *preserving decency*, and *good order*, repressing "*contempts*, and the more *effectual attainment* of *truth*, "whatever may be the *rank* of the officers, which constitute "those courts respectively; and that the prosecutor, pri-"soner, and witnesses, although they may happen to be of "a superior rank in the army to those who may form any "such court martial, are equally bound to observe the "lawful injunctions of the court, as if the same had been "altogether composed of officers of a more elevated rank."

There cannot be a doubt of the principle, so clearly laid down in the preceding opinion of the court.

A general court martial, whatever may be the rank of the members composing it, is the highest judicial body known in the military state. Its authority emanates mediately or directly from the commission of the King, and is inferior, in all acts executed under it, only to the King, and claims, on that account, respect, and not from the accidental rank of the persons employed. If courts martial had not the authority, as such, and while acting in that capacity, to issue commands to those, necessary parties to or witnesses in the proceedings before them, they could not compel the appearance of one or other of these, if they should chance by rank to be superior to any of the members of the court martial, whereby a failure of justice would happen in almost every case. It is only requisite to state the inconvenience of a contrary practice, to shew that it could not be endured.

Besides the principle of submitttng the acts of superiors to be restrained, in certain cases, by inferiors, is not an ano-

maly, or new in military practice. It is recognised, of necessity, in the third, and more particularly in the fourth Article of the seventh section of the Articles of War.

But to return to the point in more immediate reference. Two charges were afterwards preferred against *Major Browne*, and sustained by a general court martial, at the Horse-Guards, composed principally of general officers; in the first of which it was alleged, that he, *Major Browne*, had been guilty of a gross contempt and disrespect to the parties prosecuting, in the execution of their duty as judges of a general court martial, the particulars of which had been described in a report, referred to by the charge.

The *second* referred to subsequent matter, namely, "that "he had scandalously and in a manner unbecoming an officer "and a gentleman, traduced the character of the president, "and members of the court in a narrative transmitted to the "secretary of state."

The court, after a long, minute, and deliberate examination of all the circumstances, found the prisoner guilty of the contempt charged, and concluded with remarking—that, "upon the whole, having regard to the very long period of "his (*Major Browne's*) arrest (from January, 1786, to Au-"gust, 1787), during which *Major Browne* has been neces-"sarily suspended from his duty and command as an officer, "the court is of opinion, and does by this their adjudication "declare, that the punishment thereby sustained, is fully "adequate to the crimes of which he has been found guilty."

It does not follow, that all proceedings on charges, preferred for contempts of this nature, may be protracted to the length of the foregoing, whereby the fault of the person in contempt was purged by the punishment, or what had been considered in the nature of punishment, that had preceded the trial; and whereby the vindication of the respect of the court was necessarily foreborn, from the course that it had

itself chosen to adopt, in preference to the plain proceeding prescribed by this Article, and by which it might have summarily satisfied what was due to its own dignity.

The objection, generally stated to the summary proceeding of courts against contempts, is, that the court, in taking cognizance of them, is itself a *party* as well as *judge*; two incongruous characters, incompatible with the fair and impartial administration of justice. But the thing is of necessity, and could not be otherwise arranged, without inducing similar or even more mischievous effects.

In the case of *Major Browne*, the length of the arrest, previous to trial, was a more grievous punishment than the original court in all probability would have been disposed to pass upon him. But if it had been ever so short, and little or no inconvenience had occurred from it, what advantage could have been superinduced from referring the trial and punishment of the offence from one court martial to another; between whom there must be one and the same common and natural feeling of jealousy for the supposed contempt of the dignity and respect due to them? There could be no apparent advantage, it should seem, that would compensate for the chance of danger that might ensue, in the protraction of the inquiry into the circumstances of the contempt at a future season, from the absence of witnesses, or the lapse of recollection of facts or sayings, by which the ulterior judgment might fail to be satisfactory; and from the inconvenience of keeping witnesses together, and of assembling a fresh military court at seasons which might possibly be of great impediment to the public service. For these considerations, it would appear more safe to pursue the path pointed out by the Article, than, as in the latter case, to decline from it.

As the Article originates from the Crown, and from the authority conveyed to it by the Mutiny Act, it may not be

unnecessary to remark, that it cannot extend to persons, though the words of the Article are general, not constituting a part of such forces; for that would go beyond the power communicated by the statute. Are then obstructions or disturbances, of the proceedings of courts martial, that may be occasioned by individuals not wearing the military garb, to pass necessarily with impunity? The question may be answered in a word—they are *not*. They may be put down or abated by the hand of a peace officer, or by more direct means, if the violence warrants it; and the misdemeanor may be afterwards prosecuted and punished, according to its character, and at the instance of the Crown, or the law officers of the Crown, in the common law courts.

ARTICLE 22d.—This Article declares the preliminary step to the prosecution of offences to be by the arrest of the party offending—directing, "that when any officer or soldier "shall commit a crime deserving punishment, he shall by "his commanding officer be put in arrest, if an officer; or, "if a non-commissioned officer or soldier, be imprisoned, "until he shall be either tried by a court martial, or shall "be lawfully discharged by a proper authority."

The superior officer, imposing the arrest in the first instance, is declared, by a general order, to be a lawful authority to that end; who had not previously been considered, or at least not generally, as competent to the act.

His Royal Highness the Commander in Chief, after noticing in the said order, "that a detrimental practice had "obtained among commanders on foreign stations, of sending home officers with articles of accusation pending "against them, without the same having been duly investigated, and which should, except in cases of the most "urgent necessity, be in future avoided," proceeded to state, "that he judged it expedient to take the opportunity "of controverting an erroneous opinion, that an officer, who

"has been put under an arrest, has a right, as it is termed, "to demand a court martial upon himself, and may persist "in considering himself as still under the restraint of such "arrest, although expressly released therefrom by the su-"perior officer who imposed it; whereas the fact is, that a "superior officer is invested with a discretionary power of "liberating, as well as of arresting, and of requiring, that the "officer so liberated, do return to the exercise of his duty as "before; neither can any officer insist upon a trial, unless "a charge is preferred against him. It by no means follows, "that an officer conceiving himself to have been wrongfully "put in arrest, or otherwise aggrieved, is without remedy: "a complaint is afterwards open to him, if preferred in a "proper manner, for which provision is made by a special "Article of War*."

Nothing need be added in enforcement of the principle laid down in the document just quoted.

The manner in which the arrest, or personal attachment of the alleged offender, if an officer, shall be executed, is not described in the Article any further than it shall be done by the hand or authority of the commanding officer, neither is it explained by the Article, what the degree of the personal restraint shall be, imposed by such arrest. Both of these must rest on the usages and customs of war, obtaining in the several cases.

Tytler observes—"Although the law martial makes no "mention of any difference in the nature of arrests in order "to trial, a difference is established by the custom of the "army, according to the degree and measure of the crime: "an officer accused of a capital crime, or any offence of "which the penalty is so severe, as to afford a natural "temptation to escape from justice, ought to be detained "in a state of confinement as secure, as the closest civil

* General Order, Horse-Guards, 1st February, 1804.

" imprisonment. If the offence is of a lighter nature, the " presumption is, that the officer, whose character is thus " impeached, must be solicitous to obtain a judicial investi- " gation of his conduct; and he is therefore generally al- " lowed to be in arrest at large; that is, to walk about " within certain limits without his sword, on his word of " honour to await the issue of a trial, or his enlargement " by proper authority. The degree and measure of the " arrest must however be entirely at the discretion of the " commanding officer, who will in all cases regulate his " conduct by the particular circumstances, and by the dic- " tates of propriety and humanity."

Besides the *presumption* mentioned by this writer, in favour of an officer's being allowed to remain under a liberal restraint, is the *positive security* of his *commission*. This confers on him a beneficial office, is in general purchased at a considerable price, and would be subject to forfeiture on his withdrawing himself from the reach of military justice. This affords one great reason for the distinction taken between a commissioned officer and soldier, in the circumstance of the arrest.

In all cases, where the alleged crime, if proven, could not endanger more than an officer's commission, it may be said that this is a sufficient guarantee for the appearance of the accused, and that no other precautionary measure, for that purpose, would appear demandable. But in the first class of cases, mentioned by *Tytler*, additional securities should and ought to be taken.

I cannot wholly agree with the doctrine of the last-mentioned author, at the conclusion of the passage immediately noticed, that the degree and measure of the arrest must be *entirely* at the *discretion* of the commanding officer; for I conceive that such discretion, so far from being arbitrary, or

uncontrolled, as the dictum implies, must be strictly governed by the rules and customs of war in the like cases, where they exist; or, where there are none, by general reasoning and principle; and that when these afford precedents, or dictate the plain means to be observed, that the discretion must be always in conformity with them.

Imprisonment, it may be remarked, is under any shape no slight punishment of itself, and is resorted to here for the purpose of securing the person of the alleged offender to answer the demands of justice; and when it is further recollected, that the imprisonment is to be imposed on one who has the presumption of innocence in his favour, having not been yet confronted with his accuser, it should and ought to be accompanied with as little possible restraint as the nature of the case can admit, with reference to the public safety.

If, therefore, in any case, an unusual or unreasonable restraint, inferring a malicious oppression in the party imposing it (the inference being clearly deducible from the rigid and severe circumstances of the confinement), be put on an officer under arrest, it would be an undue exercise, it should seem, of the discretion vested in a commanding officer, and subject him to a responsibility to his military superior, according to the quality or extent of the abuse.

ARTICLE 23d.—The duration of the arrest or imprisonment, previous to trial, is fixed by this Articlc; which prescribes, "that no officer or soldier, whether by arrest or "imprisonment, shall continue in confinement more than "*eight* days, or until *such time*, as a court martial *can* be "*conveniently assembled.*"

One might be inclined to think, in reading the concluding branch of the Article, that the words "until such time as "a court martial can be conveniently assembled," intended

some time *within* the *eight* days, mentioned in the preceding member of the sentence. But military usage is against such a supposition.

Referring to this passage, *Tytler* observes, "that the "latter part of the clause, evidently allows a latitude, which "is capable of being abused; but as in a free country there "is no wrong without a remedy, the military law prescribes "a mode of redress for all officers or soldiers, who con-"ceive themselves injured by the commanding officer, which "must always be sufficient for the restraint of every act of "material injustice or oppression."

It would be more desirable, if the thing had been practicable, that the possibility of the occurrence of the abuse had been prevented, by a prescription of the time, in which a court martial must at all events be assembled; but they, who are the least acquainted with military affairs, must know how impossible it is in an eventful service, such as the military service must be allowed to be, to lay down any fixed or definite rule, which should regulate the time in every given case. It has therefore of necessity been left to be governed by circumstances, under the restriction and responsibility explained.

ARTICLE 24th.—A very plain duty is enjoined by this Article, viz.: "That no officer commanding a guard, or "provost martial, shall refuse to receive or keep any pri-"soner committed to his charge, by any officer belonging "to his Majesty's forces; so that the crime with which the "prisoner is charged be delivered in writing, under the "signature of the officer committing him."

ARTICLE 25th.—This has reference to the same duty enjoined by the latter Article, directing, "That no officer "commanding a guard or provost martial, shall presume to "release any prisoner committed to his charge, without "proper authority for so doing; nor shall he suffer any

" prisoner to escape, on the penalty of being punished for " it, by the sentence of a court martial."

ARTICLE 26th.—This Article is in further relation to the duty of officers in the custody of prisoners, requiring every officer or provost martial, to whose charge prisoners shall be committed, within twenty-four hours after such commitment, or as soon as he shall be released from his guard, to give in writing to the colonel or commanding officer of the regiment to which the prisoner belongs, when the prisoner is confined in the guard of the said regiment, and for the neglect of some regimental duty; or, in other cases, to the commander in chief, their *names*, their *crimes*, and the *names* of the officers who committed them, on the penalty of being punished for his disobedience or neglect, at the discretion of a court martial.

This and the two Articles last preceding are well calculated to the ends they have in view; the enforcement of the safe custody of supposed criminals—the prevention of any criminal connivance at their escape—and abuse in the wanton arrest, or discharge of parties, at the caprice of their superiors, or any failure in justice, by the screening of offences, or removing offenders from the observation of the military police.

ARTICLE 27th.—A simple declaration is made in this Article, " That if any officer under arrest shall leave his " confinement, before he is set at liberty by the officer who " confined him, or by a superior power, he shall, upon being " convicted thereof before a general court martial, be " *cashiered.*"

A breach of arrest, as here described, has at all times been regarded as a very heinous offence, and in certain cases, specified in the older ordinances, has been even *capitally* punished. The offence may consist either in transgressing the local limits, prescribed to the party under restraint, or

in disregarding or breaking the particular conditions, implied or expressly stipulated in the arrest.

ARTICLE 28th.—This Article is preservatory of the honour and credit of the army, as a professional body; by declaring, that whatsoever commissioned officer shall be convicted before a general court martial of behaving in a *scandalous, infamous* manner, such as is *unbecoming* the character of an *officer* and *gentleman*, shall be discharged his Majesty's service. The retention of a member of the army, after a conviction of this derogatory nature, would not only be disreputable to the character of the military society, but of no indirect tendency, from the force of example, to contaminate the body of the society itself.

The Article does not particularize the nature or degree of *scandal* or *infamy*, intended, through its medium, to be cast from the military community, otherwise than by describing it to be incompatible with or unbecoming the character of an *officer*, and a *gentleman*.

The words " officer and gentleman," though in general to be understood as one, single, and indivisible term, appears not to be so used here. The misbehaviour, entailing on it the penalty declared by this Article, must be such, as I understand it, as to implicate, in the first place, *the officer*; that is, it must arise in some sort out of his office; and, affect *incidentally*, only, the character of the *gentleman*. It must be such a misconduct, as must necessarily dissever, what should ever be indivisible, the consideration of the *officer* from the *gentleman*. It must be of that decisively low, humiliating, and debasing kind, as to lay prostrate the honour of the gentleman, in the degradation of the officer.

In the words descriptive of the offence, " *scandalous, infa-* " *mous* manner," the former would seem to be necessarily implied in the latter noun of quality; though the terms are not otherwise convertible. *Scandal* does sometimes, but

does not *always* infer *infamy*—but the latter, in the sense in which it is used in the Article, ever implies the first.

Infamous behaviour, if suffered to go unpunished, would in any and every case reflect a direct *scandal* on the body that should countenance or tolerate it.

Scandalous conduct, in many instances, which need not be specified, where it is not connected with such crime as is liable to the punishment of the known and declared law, however improper it may be in itself, and however unbecoming in a moral consideration, does by no means import *infamy*, from the common understanding of the term; inasmuch as it does not debase those, who may be guilty of it, in the general view of society, so as to exclude them from the communion, though it may from the respect of the world around them.

To bring the conduct of an officer within the peril of this charge, it must be *infamous*, as it seems, as well as *scandalous*.

It would have been impossible to have set forth every act that an officer might commit which would subject him to a conviction of the crime meditated in this Article; the Article, therefore, has not attempted to point out, what it could at best have very insufficiently described. But any inconvenience that could arise out of the uncertain definition of the crime, is obviated by a just and general rule, demanding, for the protection of the accused, "That in every "charge preferred against an officer, for such scandalous "and unbecoming behaviour, the *fact* or *facts*, whereon the "same is grounded, shall be *clearly specified*."

This specification is required not only for the purpose of enabling the accused to repel the facts alleged against him; but to insist before the court martial, if it be necessary, that the facts charged, do not involve the *guilt* alleged in the charge—and on which alone a prosecution could be justified under the Article.

Now the charge may pointedly set out circumstances, as it often happens, that would infer some breach of duty, or certain criminal matter, perhaps, which in the mind of the person preferring the charge, would involve *scandal* and *infamy*. And the charge may be susceptible of proof, and afterwards receive it, even to the extent of the circumstances alleged; and yet, if in the judgment of the court the circumstances proved do not warrant the conclusion drawn from them by the prosecutor in his charge, it will not sustain a conviction under this Article. For the court are to try *scandalous, infamous* conduct, and to see that which is alleged be proved in the manner in which it is alleged; they are not bound to adopt the sense, placed by the prosecutor on the actions or conduct of the accused; but on the contrary, if they see the specific matter *charged* be not *proved as* charged, and which alone infers the guilt involving the peremptory and severe *penalty* which, and no other, the court are bound by this Article to award, it will be theic duty to acquit the accused. Scandal and infamy is the essence, nay, indeed the whole of the offence, and the *facts charged* are only the inducia, or signs by which it is to be known to the eye of the court—and if those do not appear, but are negatived, the offence contemplated by the Article is consequently negatived, and the party accused would seem entitled, ex debito justitiæ, to a full acquittal.

It frequently happens in the common law courts, that a man is indicted for a *libel*, and it is satisfactorily made out in evidence, that the party indicted, wrote, printed, and published the *writing*, which is charged to be *libellous*, but the jury, looking at the writing, and not recognising in it the *quality* charged by the prosecutor, acquit the accused. This is a circumstance of almost daily occurrence.

The case of libel may help us to another illustration.—If for instance, an indictment were preferred against a per-

son for *libelling* a principal officer of the government—and the writing, printing, or publishing, of the paper in question, should be clearly brought home to him; but the jury on examination should not consider the paper *libellous* of the officer of government, though they think it a *mischievous* and *seditious* writing, they would be obliged to acquit the accused; for he was charged before them with *libel*, and *not* sedition.

A court has in all cases to deal only with the criminal matter charged, and no other—or the accused might be directing his whole attention to one object, and the prosecutor and court to another, so that the former might be surprised into a conviction on which he had not reckoned.

The doctrine which I have been endeavouring to explain, is sustained by the case of *Colonel Sir J. Eamer*, of the royal *East London* regiment of militia.

That officer was arraigned on a general charge—

"For behaving in a scandalous, infamous manner, such "as is unbecoming the character of an officer and gen-"tleman, towards *Captain B. V. Symes*, of the same regi-"ment, as follows:—

Then were detailed, in as many heads of charge, *seven* distinct acts, alleged to be so many acts of behaviour of the quality charged.

Upon which charges the court came to the following decision:—

"The court having duly weighed and considered the evi-"dence adduced on the prosecution, as well as what has "been offered in defence, are of opinion that *Colonel Sir J.* "*Eamer* is *not guilty* of behaving in a *scandalous, infamous* "*manner*, such as is unbecoming the character of an officer "and a gentleman, in any of the articles of the charge, as "preferred against him by *Captain B. V. Symes*, and do "therefore *acquit* him *thereof*."

After this *general* acquittal, the court proceeded to take notice of the several and specific charges, in the order of succession. But with respect to the *third, fourth, fifth,* and *sixth* Articles, it was observed, "the court are of opinion, "that although the *facts,* as detailed, have been *proved,* yet "that the conduct of *Colonel Sir J. Eamer* does not appear "liable to the *imputation* therein ascribed to it."

Here the court admit the whole of certain facts charged by the prosecutor, but repel his conclusion from them; namely, the *infamy* and *scandal* said to be attached to the facts, and therefore acquit the prisoner*.

So it happened on the trial of *Major John Browne,* of his Majesty's 67th regiment, at the Horse Guards, on the 13th August, 1787.

He was arraigned, among others, on a charge, for—

"Having *scandalously,* and in a manner unbecoming an "officer and a gentleman, traduced the character of *Lieu-* "*tenant-Colonel G. Foster,* as president, and several other "of the officers who composed the said court martial, by "an injurious misrepresentation of their conduct, contained "in a narrative, transmitted to his Majesty's secretary at "war," &c.

In deciding on this specific charge, it was stated—

"That the court is of opinion, that the said *Major J.* "*Browne* has, in a part of his said narrative, made an in- "jurious misrepresentation, inasmuch as he has arraigned "the conduct of the said court martial, in a degree which "he has not supported by evidence; that as it appears, he "had but too much reason, from the unjustifiable conduct "of the court martial, for most parts of his representation, "and feeling himself much aggrieved, may reasonably be "presumed to have viewed their conduct in a stronger light

* See the general order, Horse-Guards, 26th August, 1813.

" than a disinterested observer, this court is induced to be- " lieve, that he has not *intentionally* made any undue sug- " gestion, with the purpose of traducing the character of " the said court martial, and does therefore *acquit* him of " having acted *scandalously*, or in a manner *unbecoming* an " officer and a gentleman."

But *M'Arthur* details the proceedings of a court martial that would seem to bear on almost all the points on which I have immediately observed.

" At a general court martial (says the last-mentioned " writer), held at the *Cape of Good Hope*, May, 1801, an " officer was tried charged with *scandalous, infamous conduct*, " unbecoming the character of an officer and a gentleman, " in having sent a charge of six hundred pounds, or there- " abouts, against *Sir George Younge*, for a horse, which the " said officer had declared to be a present to *Sir George*, " when governor of the colony of the *Cape of Good Hope*." In respect to which charge the court martial made a distinction; they *acquitted* the officer of *scandalous, infamous* behaviour, but considered his conduct, neverthe- less, as unbecoming the character of an officer and a gen- tleman, for which they adjudged him to be suspended from rank and pay for the space of six calendar months.

The proceedings having been laid before his Majesty, the judge-advocate-general signified to *Lieutenant-General Dundas*, the commander-in-chief of his Majesty's forces at the *Cape*, that his Majesty, laying out of the case any question touching either the right or the delicacy of the officer's claim to a compensation for the horse, concerning which the difference had arisen, points not within the cognizance of a court martial, considered the adjudication as irregular, in as much as the court had *acquitted* him of the only imputation which could bring the business as a charge before them, namely, of any *scandalous* or *infamous* behaviour in the trans-

action; his Majesty could not therefore approve the sentence. At the same time it was signified, his Majesty was graciously disposed to attribute the error to the nice feelings of the officers who composed the court martial, which had urged them to mark their dislike of a conduct which appeared to them not decorous.

Since these pages have been in the hands of the printer, a case has been reported from *Bengal*, which sustains the doctrine that I have been endeavouring to inculcate, in all its parts, and in its full extent—it is that of *Captain J. Gibbs*, of the 16th regiment, N. I. in the service of the honourable *East-India* company—He was arraigned in the year 1814, at *Futtyghur*, for scandalous and infamous conduct;—

1st. In having submitted to a threat of being stigmatized as a scoundrel, by *Major E. P. Wilson*, of the same regiment, &c. &c. without having taken any suitable steps to vindicate his honour and character from such an opprobrious appellation.

2d. In having endeavoured, at *Rewarrie*, on or about the 26th October, 1813, to prevail on the wife of *Major E. P. Wilson*, to quit her husband's protection, and to fly to his, at a time when it was known that *Major Wilson* was very dangerously ill.

The court found the prisoner *not guilty* of the first charge, the same not being sufficiently proved; and did therefore acquit him of the same accordingly.

On the second charge—the court found the prisoner *guilty* of having endeavoured at *Rewarrie* (at the time specified) to prevail on the wife of *Major E. P. Wilson* to quit his protection, under the circumstances charged—but acquitted the prisoner of scandalous and infamous conduct, unbecoming an officer and gentleman.

Earl Moira, the governor-general, and commander-in-

chief in *India*, in remarking on the circumstances of the sentence, observed, in his general order to the Indian army, that—

"The court, in declaring the immoral act proved against "*Captain Gibbs*, did not come within the description of "scandalous, infamous, and unbecoming the character of an "officer and a gentleman, divested itself of all power (in the "opinion of the commander-in-chief) to award punish- "ment, because the act cannot stand within military cogniz- "ance; but inasmuch as it may be considered to come "under the above specific definition, the commander-in- "chief must, therefore, regard the court as having returned "a verdict of acquittal generally; in this view of the case, his "lordship directs that *Captain Gibbs* shall return to his duty."

I am aware, that there are cases, on a general charge for "infamous, scandalous behaviour," wherein particular courts martial, under whose cognizance they have chanced to fall, have repelled the imputation of *infamy* and *scandal*, and yet having considered the facts, proved before them, as criminal in their eyes, and deserving of punishment, have pronounced a verdict of *guilty* upon them, and sentenced those committing them to various kinds and degrees of punishment; sometimes falling short of, and at others exceeding the extent of the punishment, awarded by this Article: but, it may be hoped, that the high authority of the cases quoted, two of which were solemnly and patiently investigated at the Horse-Guards, by officers of great experience, aided by eminent and skilful judge-advocates; and with the benefit and assistance of private professional advice, would outweigh the opposing cases, were they more numerous than they are; and more especially, as the precedents of *Sir J. Eamer's* and *Major Browne's* cases are re-enforced, by the clear and pertinent decision of the highest military authority in a similar case above quoted.

SECTION THE SEVENTEENTH.

Accounts.

THIS section is simply directory of the manner, and the time, in and at which the accounts of all regiments, troops, or companies, in the King's service, other than the corps of life guards, horse guards, and foot guards (which are liable to a particular disposition), shall be made up and transmitted to the proper offices; requiring, that the same shall be governed by his Majesty's late regulations, touching regimental and district paymasters, and the mode of mustering, paying, and settling the accounts of the King's army, or according to such regulations as his Majesty may think fit to establish in relation thereto.

The regulations alluded to are too numerous and too minute to admit of their being introduced in this place, even in an abridged form; and therefore one may be excused, in following the example which is set by the framers of this Section, in making a bare reference to them. One of such regulations, however, is of so much importance, as to have given rise to an additional Article of War, that will fall under this section, and on that account seems deserving of a separate and specific notice.

ADDITIONAL ARTICLE.—This has been introduced since the publication of the last Mutiny Act, in 1815, and was called for, it is believed, by previously existing irregularities, in making up the accounts of non-commissioned officers and privates in the late Peninsular war, whereby great inconveniences had been occasioned to official persons

and soldiers, in the payment and the receipt of the sums due to individuals sent from abroad to the mother country, either in a regular or extraordinary course of service. To prevent these in future it was proposed and the proposal was at length formed into an Article of War, that every soldier should be furnished with a book, from time to time to be made up, for the purpose of shewing the true state of his accounts with the public; which he should be obliged to preserve, under certain described penalties, and cautions.

The Article speaks for itself—being of the following tenor:

It having been determined, that every non-commissioned officer, trumpeter, drummer, fifer, and private man of the King's forces, should be henceforward provided with a book, calculated to shew, at all times, the actual state of the accounts of such persons respectively, it is hereby declared, under the authority of the Act of the 55th *George* the *Third*, (the late Mutiny Act), that any of such persons or person, who shall deface the said book, or lose the same through want of care, shall besides the postponement of the settlement of their claims, to any pay, clothing, bounty, &c. that may be due to them, be liable to such other punishment, not extending to life or limb, or to corporal punishment, as shall be awarded by a general (regimental) or detachment court martial.

And further, that every commanding officer do state, upon the monthly return of the regiment under his command, in the space allowed for "occasional remarks," whether the men of the said regiment are in possession of the books, by the Article ordered, and whether the accompts are regularly and properly kept.

SECTION THE EIGHTEENTH.

Entry of Commissions and Leaves of Absence.

An order is given, through the medium of this Section, that all commissions and leaves of absence granted by his Majesty, or by any of the King's generals, having authority from his Majesty, shall be entered in the books of the secretary at war, and commissary general, otherwise they will not be allowed at the musters.

The intent of this regulation is to prevent, in the first place, any possible collusive practice, in the grant of private, or, as they are sometimes called, *pocket* commissions, to the injury of the army at large; and, in the *second*, to obviate any connivance in the allowance of leave of absence, by colour of which particular officers might be favoured in the enjoyment of several offices at the same time, in different places or countries, the duties of which might be incompatible one with the other; or by which they might be permitted to draw the pay of an efficient office, without discharging any of its duties, whereby the fair claimants on the King's and the national munificence might be defeated, to the abuse of the public service, and to the waste of the public revenue.

The required entrance of a commission, or of leave of absence, on the official books of the secretary at war, and the commissary general, before it shall be allowed at muster, would seem to be a sufficient security against the evil practices, intended to be prevented or suppressed through the operation of the existing regulation.

The order is mandatory on all those, whose duty is in any way concerned in the official furthering or entering of such commissions or leaves on official record; but these may be

quickened or complained of by any one, who may be prejudiced by the negligence of such officers.

It is not necessary to set forth how general or special leaves may be obtained, or the grounds on which, or the times for which, and the officers by whom they may be granted, as all of these are particularly described in various regulations, having regard to the subjects respectively, and to which officers must of necessity conform in their applications, as circumstances demand.

SECTION THE NINETEENTH.

Effects and Credits of deceased Officers and Soldiers, and of Deserters.

THE policy of the law military has at all times provided ordinances for the protection of the personal property of officers or soldiers, who die in the service of their country; and for the preservation and distribution of it to those who have a direct or incidental claim on it.

By the Articles of the *Earl* of *Northumberland*, and others of a later date, it was declared to be an offence liable to an arbitrary punishment, for any one to take or spoil, "the "goods of him that dieth or is killed in service;" with a further penalty, of restoring to the party, having a right in the goods, double their value.

In *Sutcliffe's* compilation of war ordinances in the time of *Queen Elizabeth*, it is declared—

"If any captain, gentleman, or souldier, declare, or make "his testament, or last will of goods he hath in campe, or "fortresse, or which he hath gotten in service, the same "shall be enrolled in the judge martiall's office, and executed

" by those that are named executors; if *no* will be made,
" then shall his goods descend to his next kindred, or wife,
" if he have any; if he have none, or if none come to de-
" mand his goods, within *one* yeare, then shall his goods be
" bestowed on the poore soldiers of the regiment or com-
" pany, the division being made by two or three deputed to
" administer them."

There is an Article* of *James* the *Second*, which provides for the preservation of the *overplus* of the estate of deceased officers and soldiers, after the quarters and other necessary expenses shall have been paid, and for the keeping of such overplus to the use of those to whom it shall belong, if they claim it within the space of three months from the death of the party: but it does not specify what is to become of it after that period; so that probably it was distributed after the manner observed in the case last mentioned.

But courts martial formerly exercised a very large jurisdiction over the personal property of deceased officers and soldiers, granting the administration of such property, according to the distribution ordered by martial law, or of the country where the deceased died; and entertained petitions, and various adverse proceedings touching the assets and estates of deceased persons serving in the army, and rendered them liable or chargeable with the debts or engagements of the deceased †.

Blackstone, among the pivileges of soldiers, mentions, that

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* The 59th.

† There is a form preserved of a claim preferred to a court martial, for administration to the estate of the *Earl* of *Middleton*, who had died at *Tangiers*, on the behalf of his Countess, who was on the spot. It is to be found as a number in *Ayscough's* Catalogue, *Bri. Mus.* Vol. 1, p. 138, M. S. No. 3299. art. 76.

" *Countess Dowager* of *Middleton*, Widow of *J. Earl* of *Middleton*—foras-
" much as the said *Earl* of *Middleton* hath left noe will by *word* of *mouth*,
" or by *writing*, puts in her claim to the court martiall, for administration
" on the state of her lord, late deceased in this place, which claime she de-

in actual military service they may make *noncupative* wills, and dispose of their goods, wages, and other personal chattels, without those forms, solemnities, and expenses, which the law requires in other cases: and he adds, our law does not extend this privilege so far as the civil law, which carried it to an extreme that borders on the ridiculous. For if a soldier, in the article of death, wrote any thing in bloody letter on his shield, or in the dust of the field with his sword, it was a very good military testament.

In addition to the provision of the common law, and in imitation of the ordinances of former times, his Majesty in the Section before us, has constructed Articles of War, with the like purpose, that are well calculated to prevent the dilapidation of the present and tangible estate of those who may die away from their homes, in the prosecution of the King's service, and to keep it inviolate and indistributable, until those, having right or interest, shall present themselves to claim it; a more just, if not a more specious distribution, than is favoured in the ordinances of anterior seasons.

ARTICLE, 1st.—This Article provides, that "when "any *commissioned* officer shall happen to die, or be killed "in the King's service; the major of the regiment, or the "officer, doing the major's duty in his absence, shall immediately secure all his effects or equipage then in camp or "quarters; and shall before the next regimental court "martial make an inventory thereof, and forthwith transmit the same to the secretary at war, to the end that, "after the payment of such officer's regimental debts, and

"sireth may be admitted and confirmed, according to the laws and Articles "of Warre, and the law and practice of this place, *Tangiers*.

M. Middleton.

There are other documents, of the same date, which appear to be at the time of the government of *Colonel Norwood*, at *Tangiers*, having relation to the jurisdiction of courts martial, in matters of this description; that are preserved in the same collection.

" quarters, and interment, the overplus, if any be, may be " paid to his legal representative."

This provision places the effects and equipage of deceased officers under the charge of a known and superior officer in every regiment, and who is thereby rendered responsible for the safe custody of them, and of doing all the other acts, specified in the Article. Though the Article only prescribes that the major or some other officer, officiating as such, shall, make an inventory of the effects of the deceased before the next regimental court martial, it implies that he may convert them into money, in so much as to answer the debts and demands, particularized in the Article, and in order to execute the ulterior end of the same; *i. e.* the payment of the overplus, if there be any, after such debts and demands are satisfied, to the legal representatives of the deceased.

It would be at the private responsibility of the major, if he further intermeddled with the estate of the deceased, than he is of necessity authorized by the Article, in the particulars ordained.

Cases might and do sometimes occur, where it would be and is desirable that this officer should have a larger power, for collecting the goods and estate of the deceased; as it often happens, on foreign service, when there is no near friend of the deceased on the spot, that the outstanding debts, due to the deceased, cannot be gathered in, at the instant, for the benefit of those interested in them, from the want of some local and present power to perform this just and necessary act; and that they afterwards become desperate, or are from other circumstances not realizable. But it would not be fit, or practicable, perhaps, to arm the major with such an authority, without making him accountable for the debts of the deceased; which would involve him in the conduct of litigious proceedings, and in duties which might be at variance with his public

functions and his private interests, and sometimes implicate him in suspicions hurtful to his feelings. For these reasons, perhaps, his duty is narrowed to the execution of the few indispensable acts specified in this Article.

ARTICLE 2d.—This makes a similar provision, in the event of the death of a non-commissioned officer or private soldier, ordaining, in that case, that "the then commanding "officer of the troop or company, shall, in the presence of "two other commissioned officers, take an account of what-"ever effects he dies possessed of, besides his regimental "clothing, arms, and accoutrements, and of his credits, "and shall take care that the same be applied in the first "instance to the liquidation of his regimental debts; the "remainder to be placed in the hands of the regimental "paymaster, to be paid over to the representative of the "deceased, if claimed within the regulated period; or if "not seasonably claimed, the same to be remitted to the "regimental agent, a report thereof being made to the secre-"tary at war."

The lively interest discoverable in this Article, for securing the effects and credits of soldiers to their relatives and representatives, marks the humane and peculiar attention of his Majesty to this very meritorious class of men.

There is a provision, at the foot of this Article, for the disposal of the effects and credits of deserters; directing, that they shall be applied in like manner, with the aforementioned effects and credits, to the liquidation of their regimental debts; and the remainder, if any, to be brought to the credit of the public.

SECTION THE TWENTIETH.

Artillery.

THE 130th Clause of the Mutiny Act having recited, that it might otherwise be doubted, whether the officers and persons serving in the Royal Artillery, and those hired to be employed in the trains of artillery, or the officers, serving in the corps of Royal Engineers, or the officers and persons serving in the corps of royal military surveyors and draftsmen, or the corps of royal military officers and labourers, or the master gunners and gunners under the ordnance, be within the intent and meaning of the Mutiny Act, proceeds to enact, and declare, that all and every of such persons, of each and every description, are and shall be at all times subject to all the penalties and punishments mentioned in the said Act, and shall in all respects whatsoever be holden to be within the intent and meaning of the same. Now, to give immediate effect to this enactment have the subjoined Articles been framed.

ARTICLE 1st.—This Article simply and generally ordains, that all officers, non-commissioned officers, gunners, conductors, drivers, or any *other* persons *whatsoever receiving pay*, or being *hired* in the service of the Royal Artillery, shall be governed by these the King's rules and articles, and shall be subject to be tried by courts martial, in like manner with the officers and soldiers of his Majesty's other troops.

In the next Article, however, there is an exception declared, in a given case, in the constitution of courts martial, for the trial of persons of the descriptions enumerated in the present Article.

ARTICLE 2d.—The corps of Artillery was considered

formerly as separate from the army at large, and entitled to peculiar privileges, in precedency, and in the interior government of the body itself. In respect to the latter we find it ordained by the war statutes of *Henry* the *Eighth*:—

"If any of the retinue of the ordnance rob or slea any of "their own company, or make any debate or affray, or "have any demaund or question among themselfe, that "then it be reformed, judged, and punished by the master "of the ordnance, and such as he may call to him; always "provided, if any man finde himselfe grieved, after any "finall sentence, that hee be at his apele before the marshall "at all seasons: And for all causes made betweene any of "them, and any other person of the army, that there they "or any of them abyde the judgment of the marshall and his "court."

The precedence of this most useful and respectable body of men is still retained and regulated by his Majesty's general ordinances and regulations for that purpose: and also the privilege of trying the members of the peculiar corps by its own officers, by virtue of the Article now under consideration, when it can be done without inconvenience to the public service, or prejudice to the rights of others of the military community.

With these reservations in view, the second Article provides—"For differences arising among themselves (*i. e.* "among officers, non-commissioned officers, gunners, conductors, drivers, &c.), or in matters relating solely to their "own corps, the courts martial may be composed of their "own officers; but when a sufficient number of such officers "cannot be assembled; or in such matters wherein other corps "are interested; the officers of Artillery shall sit in courts "martial with the officers of the King's other corps, taking "rank according to the dates of their respective commissions, and not otherwise."

ARTICLE 3d.—This relates to officers serving in the corps of Royal Engineers, and all officers and persons serving in the corps of royal military surveyors, draftsmen, or in the corps of royal military artificers, and labourers, and all master gunners and gunners under the ordnance, and directs, that they are to be governed by these his Majesty's rules and articles; and equally subject to trial by courts martial as officers and soldiers of the King's other troops.

SECTION THE TWENTY-FIRST

Troops raised or serving in the Colonies.

THE liability of colonial troops to military law, and the relative rank of the officers commanding them, is declared and adjusted in the several Articles of this Section.

ARTICLE 1st.—This is little more than a transcript of the 131st clause of the Mutiny Act. It declares that "the "officers, non-commissioned officers, and soldiers, of any "troops which are or shall be raised or serving in govern-"ments, colonies, or dominions, or in countries or places "in possession of the king's subjects, or any of his forces, "being *mustered* and in *pay*, shall at all times and in all "places, when *joined* or acting in *conjunction* with the "King's *British* forces, *or*, under the *command* of an *officer* "having a *commission* immediately *from the King*, be go-"verned by these Rules and Articles of War, and shall be "subject to be tried by courts martial, in like manner, as "the officers and soldiers of the King's British troops."

The object of this Article is to enforce an uniformity of discipline, in a common service, through the same laws and the same means of administering them.

The Article deviates, in some sort, from the clause in the Mutiny Act on which it is manifestly founded; inasmuch as it ordains, that officers and soldiers of colonial troops, when joined or acting in conjunction with the King's British troops, shall be governed by the Rules and Articles of War, &c. whereas the Mutiny Act enacts, that they shall be governed, only, while under the command of an officer, having a commission immediately from his Majesty; which possibly might not happen in the circumstances specified. If the Article may be supposed to intend that the joint force should be commanded by an officer of that description, then the specified case would seem to be needless; since, in all cases when a colonial force shall be under the command of such an officer, it is directed in the Mutiny Act, and in a subsequent part of this Article, that it will be liable to be governed by the Articles of War, and subject to be tried by courts martial, in like manner with the officers and soldiers of his Majesty's British troops.

ARTICLE 2d.—By this Article the rank of General and other officers, holding commissions from governors, lieutenant or deputy governors, or others exercising a supreme local authority, in the provinces and colonies of *North America*, are adjusted and settled, in relation to officers of his Majesty's regular forces, when they shall be employed on a joint service.

It expresses, in the first place, his Majesty's will and pleasure, that all provincial General officers or Colonels, holding the said commissions, shall, on all detachments, courts martial, or other joint duty, take rank next after all Colonels, serving by commissions signed by his Majesty; or by his Majesty's General, commanding in chief in *North*

America, although the commissions of such provincial Generals and Colonels should be of an elder date.

And secondly, that, in like manner, lieutenant-colonels, majors, captains, and other inferior officers, serving by local commissions within the said provinces, shall, in the like cases specified, have rank after all officers of the like rank serving by commissions signed by his Majesty, or by his General as aforesaid, and although the commissions of the first-mentioned officers should be of older date to those of the latter.

This Article originates out of the high prerogative of the Crown, and is governed by a principle so obvious, that it would seem altogether unnecessary to advert to it.

SECTION THE TWENTY-SECOND.

Troops in the East Indies.

THE Articles, comprised by this Section, are two in number, relating to the association of the officers of the King's and the *East-India* company's armies, for certain declared purposes, and to the adjustment of the relative rank of such officers one to the other.

ARTICLE 1st.—This Article provides, that, when the King's forces shall be employed with the troops of the *East-India* company, the officers of his Majesty may sit in conjunction with the officers of the said Company and proceed to the trial of any officer, non-commissioned officer, or soldier, in like manner as if such courts martial were composed of officers of the King's army, or of officers in the said service of the United *East-India* company only; with this

distinction, that, on the trial of an officer or soldier of the King's forces, regard shall be had to the regulations and provisions contained in the Mutiny Act and the rules and Articles of War, made by his Majesty for the government of his forces, and the oaths administered to the members of such court martial shall be in the terms therein, and thereby prescribed; and on the trial of any officer or soldier, in the service of the *East-India* company, by the 27th of *George the Second*, the standing Mutiny Act for the government of the *East-India* company's forces.

There is no limitation as to the relative number of officers of the different services that may be ordered to sit on the several courts martial respectively. This must depend on the discretion of the authority convening the court martial.

The several acts of the legislature, alluded to, differ in many respects and among other things, in respect to the number of officers requisite for the formation of courts martial, and more especially in the mode of constituting general, regimental, and detachment courts martial, and the taking of evidence in such latter courts, and in many particular provisions that have been introduced into the Mutiny Act and Articles of War, in improvement of the military code, since the 27th of *George* the *Second*. From the benefit of these improvements, the members of the *East-India* company's army are, at present, generally excluded, from the permanent nature of the code established for its government, which, unlike the regulations for the government of his Majesty's armies, is not annually submitted to the revision of parliament.

The existing law, for the regulation of the Company's armies, is the same that it was more than half a century ago; and it may be supposed, that it is not indifferently calculated to its ends, since it has remained unaltered, from the time it was originally declared, to the present date.

ARTICLE 2d.—By this Article it is declared, that his Majesty's officers shall have precedency of the officers of the same rank in the *East-India* company's service, without reference to the dates of their respective commissions, and although the commission of the latter officers should be of elder date, whensoever such officers shall be employed together upon detachments, at courts martial, or upon other joint duty.

This provision having been found, in process of time, in respect to the distinct services, not less invidious than impolitic; means were devised by the late *Marquis Cornwallis,* then governor-general of *India,* to do away, in effect, this ungrateful distinction, in an humble recommendation to his Majesty, which was graciously adopted by the Crown, to grant brevet, or king's commissions, to each of the officers of the company's armies, correspondent in tenor and date to that with which he was previously furnished by the *East-India* company; thereby vesting such officer with every right, for all local military purposes, with which a king's officer of the like rank is vested by his commission. These commissions were first granted in the month of March, 1789—and have ever since been allowed, as well to officers, whose services have enured, as to others entering anew into the honourable the *East-India* company's service, and according to the additional rank that has accrued to such officers from time to time, and the relative brevet rank of the officers of his Majesty's service. The consequence of such latter commissions has been to make the company's officers in effect king's officers, though, at the same time, officers of the *East-India* company; and by virtue of such conferred commissions to take rank with king's officers on any joint service, according to the tenor and date of their relative commissions from the Crown, or the king's com-

mander-in-chief in *India,* having authority to grant such commissions.

It may be here remarked, that the commissions, granted by the Crown, to the officers of the *East-India* company's service, have force only for the time that such officers remain in such service, and are terminated by any event that puts a period thereto. Such commissions may be resigned by the officers holding them, at their own desire—after the stipulated term, in their covenant with the *East India* company, is expired; but it must be with the permission of the Company's government or commander-in-chief, at the time being. They cannot, as erroneously supposed, be thrown up at the sole will of the officers respectively. This was settled in the case of *Parker* v. *Clive* *, and *Vertue* v. *Lord Clive* †.

While these commissions are in force, it may be supposed that an election is given to those, who hold them, to claim the benefit, when they shall be so advised, of the Mutiny Act, and the Rules and Articles of War, published and declared for the government of his Majesty's armies; for though the preceding Article provides, that in the trial of the *East-India* company's officers and soldiers, regard shall be had to the 27th of *George* the *Second*,—yet the Article does not respect the officers in any other light than as the Company's officers purely; having no view to the commission granted by the Crown (bestowed subsequently to the publication of the Article), which may give rise, as suggested, to additional rights and claims.

In this latter regard, perhaps, the court martial, of which the late *General M'Douall* was president, which was assembled at *Trichinopoly* for the trial of *Lieutenant-Colonel*

* E. T. 9 *George Third*, 4 *Burrows*, 2419.

† M. 10 *George Third*, 4 *Burrows*, 2492.

J. Oliver, of the service of the *East-India* company, was induced to allow to that officer the benefit of the clause of limitation*, which is not introduced into the 27th of his late Majesty, by refusing to take cognizance of any matter of criminal charge, which appeared on the face of the charge, or the evidence adduced in support thereof, to have been committed more than three years previously to the signature or issuing of the warrant for the trial of the officer in question.

The arrangement of the *Marquis Cornwallis* in no way abrogates the letter of this Article; though it in some sort defeats the intention of it. But it must be remembered that it is a measure proceeding out of bounty—and may be altered according to circumstances, or the will of the Crown, or at its sole pleasure be altogether annulled. Whilst, however, it remains in force (and from the known beneficial effects of it, may it long continue so!) it places the officers labouring in the same cause, and emulating each other's glory in the service of their common country, on one and the same footing; and induces an harmony, so greatly to be desired, in their mutual exertions.

As the Mutiny Act and Articles of War, established for the government of the forces of the honourable *East-India* company, agree, so far as they go, with the provisions of the Mutiny Act and Articles of War for the government of the king's forces, it will not be requisite to direct the officers of the former service, for an explanation of the law, as binding and obligatory on them, in any information they may desire on a particular point, further than to what has been observed, on correspondent provisions and rules, *in pari materiâ*, to be found in the Mutiny Act and Articles of War, laid down by his Majesty for the observance of his own forces. A repetition of such observations in this place

* 146th clause of the Mutiny Act.

would only have extended the size of this volume to an inconvenient and unnecessary bulk.

That part of the facts and reasoning which precedes or follows, and it is not much, that does not directly apply to the 27th *George* the *Second* (the Company's Mutiny Act), and the Articles thereon founded, will not pass wholly without its use to the officers of the Company's service: in as much as it will serve to shew the usages and customs of war, when individuals may find it necessary to advert to them in the adjudication of intervenient cases, that are directed to be decided with a reference thereto; and of which no surer proof could be exhibited, than what is supplied, where it undertakes to notice and acknowledge them, by the letter of the law.

SECTION THE TWENTY-THIRD.

Troops on Board Ships of War.

THIS is a signification of the royal will and pleasure, conveyed in a single Article, touching the conduct of his Majesty's troops on board ships of war.

It is material to the proper understanding of the Article, to consider the place and company in which it is found, and the parties to whom it professes to relate, or otherwise an erroneous opinion might be entertained of its intention or extent.

It is discovered, as it may be seen, in a compilation of Rules and Articles for the government of his Majesty's forces by *land*, and in association with numerous other Articles of the like quality, and for the like purposes; and has relation, so far as it is mandatory, to officers and soldiers of the said forces, and those only. The Articles,

also, of which this constitutes a part, are formed by the king, of his prerogative, or by virtue of an authority, delegated by the Mutiny Act.

The Article, in substance, states it to be his Majesty's pleasure, "that officers and soldiers, while they shall be "embarked on board his ships, or any other ships in the "king's commission, employed in the transportation of "troops, shall strictly conform themselves to the laws and "regulations established for the *government* and *discipline* of "the *navy*, and shall consider themselves for *these* purposes, "as under the command of the senior officer of the par-"ticular ship on which they are embarked."

Taking the words, used in this Article, as tantamount to a command, and of equal effect with any other regulation contained in any of the other Sections, they are to be construed and interpreted by the same rules, and liable to the same restrictions and limitations, as other words put into the like form. So considering them, they appear to amount to nothing more than a bare and naked command, to be enforced, in the event of contravention, or neglect by those who ought in duty to observe or obey them, by the same means and instrumentality by which the ordinary Articles are to be enforced; or in other words, that the Article conveys a command to the military body from the supreme military power, which the former is bound to obey; and if obedience fail, the neglect or breach of the command will be a *military offence*, and, as such, punishable by a *military court*, through the means of which all offences of a military nature, whether of omission or commission, are ordered to be punished.

The instances are common, and of so frequent recurrence, as not to require any enumeration, in which peremptory commands or regulations of this sort are laid down in the Articles of War, without any mention that the breach, or

neglect of the matters therein enjoined, will be a military crime, or of the medium through which it is to be pursued or prosecuted. But these are always to be presumed on principle, usage, or law, in the like cases.

If it be rightly stated, that this Article contains a common military regulation, made in the course of an original or delegated power of his Majesty, and promulgated as such, as among the ordinary Rules and Articles of War, it would seem impossible to conclude, that it can be taken notice of in any light other than in that in which it has been contemplated. For military crimes can only be declared by the Mutiny Act, or by his Majesty, through the authority vested in him by that Act, or of his own prerogative; and in either case can only be tried by courts constituted for the cognizance of such crimes.

In any breach, therefore, of the duty prescribed by this Article, the same must be prosecuted in the military court, and no other, and by force of this Article. If the cognizance of such offence could be assumed by any other court, it would divest the members of the military body of the law expressly made for their government; of the courts appointed for the due administration of such law; and subject them, in its stead, to foreign laws, so far as it regards them, of which they could not be supposed to have any accurate idea, and to judicial proceedings, to the course of which they might be utter strangers.

But if, contrary to the foregoing statement and conclusion, it should be supposed and maintained, that the Article, by placing officers and soldiers of the land service, whilst at sea, under the command of the senior naval officer of the ship, on which they are embarked, they are necessarily placed under the naval laws for the enforcement of such government and discipline, it will be for those who maintain that position, to prove not only that the Article is competent

to take the military officers and soldiers from without the authority and protection of the laws provided for them, and to place them under laws, especially framed for a peculiar and distinct class of men, but particularly to shew the power of the naval courts over the new subjects, supposed to be submitted to their jurisdiction. If the full competency of the Article could not be clearly made out in all these particulars, the naval courts would have to exercise a very doubtful, if not a very hazardous jurisdiction in the premises.

A mere and simple view of the oath, prescribed, by the 19th of his present Majesty, to all the members of naval courts martial, is sufficient to shew, that the jurisdiction of such courts is limited to offences declared by the express Articles and Orders of the 22d *George* the *Second*, and in cases where they are not so declared by the conscience and best understanding of the members of such courts, and the custom of the navy; which negatives the very idea of this Article having any influence on the minds or consciences of such courts.

The Article would have had a more than ordinary effect, if it could be construed to have the force, of itself, to abolish one species of courts, established by positive law, for the cognizance of especial crimes, and substitute other courts, appointed for the investigation and punishment of other crimes of a peculiar and distinct order—*i. e.* in effect, to abrogate the Mutiny Act, in respect of certain offences, and to extend the naval acts and articles, so as to embrace them, in its stead.

This Article has been conceived by a writer of some celebrity *, " to give an additional energy to the statute for the " government of the navy." But whatever may be its force with the military body, it communicates not any power, or even a direction to the officers of the navy, nor a scintilla of

* So it is stated by *Mc Arthur.*

authority to naval courts; neither does it give any extension to the provisions of the statute, to which it is said to impart an additional energy; but the same, so far as it refers to offences committed by officers or soldiers on board ship, must rest on its own internal strength, and not depend, for any thing, on the aid of the Article in question.

I have been, perhaps, unnecessarily minute in considering this Article, from a confused notion which prevails, and to which the Article appears to have contributed some weight, of the applicability of the Naval Articles, in *general*, to officers and soldiers of the land service, while embarked on board ship. A notion of this kind seems to have been entertained by the writer immediately referred to, grounded on an opinion, formed by several eminent and distinguished characters in the navy, and, it may be added, very universally prevailing therein.

Mc Arthur having noticed an attempt of the commander in chief of his Majesty's forces, to introduce some new regulations, in the year 1795, relative to the government of the troops at sea, and that his Royal Highness had been induced to forego it, on account of the representations of certain naval officers of high rank and consideration, takes occasion to remark—

"The law therefore (intending the naval law) stands as "heretofore; and, by virtue of the statute above mentioned "(viz. 22d *George* the *Second*), all *officers and soldiers, serving* "on *board* his Majesty's *ships*, are amenable to a naval court "martial, for *any* offences specified in the Naval Articles of "war."

The naval law is not, it is true, in any way affected by the proposed regulations of the Commander in Chief, but without some facts or proofs, which the last-mentioned writer has not yet produced, or without some particular reference to the parts of the statute, on which he relies, it cannot be admitted

that officers and soldiers, in the case specified, are subject to all, if any of the Articles established for the government of the navy. To cede a point so material to the army, to an authority of more eminence even than the writer in question, on *assertion* merely, would seem an act of inexcusable deference; and more especially in him who has taken a very different view of the statute of *George* the *Second*, and the Naval Articles engrafted on it, from the author of the Treatise on the Principles and Practice of Naval and Military Courts Martial.

From the very title of the 22d *George* the *Second* it appears, that this statute was designed for the government of the King's navy, and that it had this exclusively in view, being an act, as it is entitled, "for amending, explaining, "and reducing into one act of parliament, the laws relating "to the government of his Majesty's ships and vessels and "forces by sea." The *preamble* strengthens the impression raised by the *title* of the Act, speaking to the following effect—"Whereas the several laws, relating to the *sea service*, "made at different times, and on different occasions, have "been found by experience, not to be so full, so clear, so "expedient or consistent with each other, as they ought to "be;" be it therefore enacted, &c.—

From the title and preamble of the statute, it would seem clear, that the legislature had nothing directly in view, at the time of making the statute, but the government of his Majety's ships, vessels, and forces by sea. And if, in the provisions it has framed for this direct purpose, it has incidentally introduced any regulations, referable to *others*, such must be distinctly and unequivocally designated, in order to make them liable to a law which is professedly intended and declared for another and specific body of men.

Now of the numerous Naval Articles, engrafted on the statute, there are but four, in which the term *soldier* occurs,

and this term may be conceived to refer, from the context, to a soldier belonging to the fleet; at this time universally and better known, under the description of a *marine;* or one acting in that capacity. In every one of the Articles wherein the term is found, it would seem to convey the idea, that the person intended, as he is constantly described, one *of* or *in* the fleet, is an integral or constituent part thereof, *i. e.* attached permanently or temporarily to the sea service, and not a mere passenger, as a soldier would seem to be, in transit from one military station or service to another.

Besides it appears that land officers and soldiers, by the 5th section of the 19th *George* the *Third*, are not liable to punishment or trial on board any transport ship, for offences specified in the several Articles of that Act, which are the same that are contained in the 22d *George* the *Second;* nor are they liable, on principle, to the same Articles, when accidentally embarked in ships, be they what they may, used merely *as* transports, *i. e.* for the purpose of conveying troops on military expeditions. It is the character in which soldiers are acting on board, their identity with, or separate condition from the ship's crew, that submits them or excludes them from the operation of the Naval Articles. The quality of the ship itself, for a transport usually bears the King's commission, makes no distinction in the quality or liability of the soldiers embarked on it.

But if there existed any doubt in this respect, it must be obviated by the 19th of the King, defining the jurisdiction of naval courts martial.

In the 4th Section of the Act last mentioned, the locality of the offences, and the persons of the offenders, over which naval courts are to exercise a jurisdiction, are specifically though negatively set forth. It will not be required that any allusion be made to the offences, from the circumstance of

the local commission thereof, which are placed by virtue of the Act, under the cognizance of naval courts martial, it being sufficient for the present purpose, to allude to the *condition* of the *persons*, by whom they may be perpetrated, in order to give such courts jurisdiction in the premises. In looking at the latter, on which the statute is operative, it would seem to have no manner of relation to soldiers, while embarked for transport on ships of war; but on the contrary, it virtually, if not expressly excepts them from the jurisdiction of the naval courts: by providing, that nothing contained in the Articles of War shall extend, or be construed to extend, to empower any court martial to be constituted by virtue of the Act, to proceed to the punishment or trial of the offences, specified in the several Articles, which shall *not* be committed by such persons at the time of the offence committed, "as shall be in *actual service* and *full* "*pay in* the fleet or ships of war of his Majesty, &c." So that according to the statute, there must be two co-operating circumstances, to make the Naval Articles attach to any persons on board; namely, their being in "actual service," and "full pay," *in* the fleet or ships of war; both of which circumstances are wanting in the condition of soldiers merely in transit from one station to another. Now the service, spoken of by the Act, is *sea service* expressly, and the title and the preamble refer only to this; in which it cannot be supposed, that soldiers not retained in the sea-service, nor forming any part of the ship's crew or complement, but being nothing other than passengers in the ships on which they happen to embark, can possibly be included. And as little, it is conceived, can they be taken to be in full pay *in* the fleet or ships of his Majesty, in as much as they are not entitled, as soldiers, to any pay in the fleet or a particular ship, but are to receive whatever pay they may claim for their services, from another source and particular pay-

masters, in a distinct department of government, appointed by a special Act of the legislature, and subject to specific regulations.

If under one or other of the circumstances required, to attach the naval jurisdiction to persons on board the fleet or ships of his Majesty, soldiers shall not range, it is plain that the naval Articles can not apply to them, the Act demanding that both circumstances shall concur to reduce them to the jurisdiction of the naval courts.

It may be reasonably contended, on these and the other considerations, that soldiers, from the single cause of their being accidentally on board ship, are not on that account liable, while they shall remain there, to the laws attaching to the navy.

But it is impossible to infer, on any view of the naval code, embodied in the Acts of the 22d *Geo.* 2d and 19th *Geo.* 3d, that it can sustain the position in the extent contended for by *Mr. M'Arthur*, on the seeming authority of the naval commanders referred to in his treatise, that the *general* Articles of such code, declaring and defining offences, apply to soldiers.

From an examination of the Articles in question, it will be seen that *four* of them only, viz. the 3d, 4th, 19th, and 22d, attach to soldiers by name: to these, therefore, alone, could they in any sense be understood, as soldiers, to be subject:—for the rest of the Articles regarding general objects, foreign from the members of the military community, as stated in the title and preamble of the statute, cannot on any rule of construction be supposed to apply to *them*. The very naming of soldiers, as liable to certain Articles, is a virtual exclusion of them from all others: and particularly as such others are declared by the statute to be referable to another order of men.

It has however been shewn, or attempted to be shewn,

that even the four particular Articles in which soldiers are named, are only applicable to them, if they be in actual service, and in full pay in the fleet, *i. e.* as marines or acting as marines, in which case their condition, as mere soldiers, is changed, and they fall under new arrangements, for pay and other contingencies disconnected with the army, and by reason thereof become constituent parts of the crew or complement of the fleet or ships on which they happen to be embarked. Hence they answer the description of persons, to whom the Articles in the 4th Section of the 19th of his present Majesty, are declared to extend.

But the offences, declared by the 3d, 4th, 19th, and 22d Naval Articles, are so many specific offences against the letter of the Mutiny Act and Articles of War: and it would seem not a little preposterous, that a law, annually passed, especially applying to the self-same offences, and constituting particular courts, for the trial of the same, having no reference to the naval statutes, and having no relation in matter to the same, should be so far controlled by them, as to remove the subjects and objects of such law, to a new code, and a new judicature. And when to this it is added, that, by such construction of the Naval Articles, the members of the military community, officers as well as soldiers, would be deprived of their most valuable rights, secured to them by the Mutiny Act, and the whole series of the Articles of War*, it would be

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*In the Army, the meanest soldier cannot be punished without a trial, and in several instances he has a right of appeal.

Commissioned officers must be tried by courts consisting of a certain number of members; and sometimes of a particular rank, and neither they, nor soldiers, in capital cases, can be condemned to death, without two-thirds at least of the court shall agree in the sentence.

That the sentences, in all cases, affecting the commission of officers, are subject to the revision of the Crown.

Without entering into particular comparisons, I shall content myself with adding, that in almost all of these particulars, and for reasons peculiar to the service, an opposite rule prevails in the Navy.

difficult, and one should have thought impossible almost, to admit the supposition.

But such a notion has been entertained, and by men whose pure and unbiassed opinions, in matters within their own profession, are entitled to great and deserved consideration. In this case, however, it is apprehended, that they were not competent, from the influence of present circumstances, to exercise a cool and dispassionate judgment: or, however that may be, it is evident, that in fact they have not exercised it; but have betrayed, it is feared, such an impatience and intemperance of conduct, exemplified in the manner and tone in which they consulted, and communicated their representations and remonstrances on the subject to the highest naval authority under the Crown, as is utterly inconsistent with every accepted idea of military subordination.

The opinions of men, therefore, acting under these humours and impressions, must be received with some distrust, and would not seem entitled to that serious weight which one should feel inclined to pay to them, if given under ordinary circumstances.

The pretensions of general superiority, in their own province, over the military community, as set forth and claimed by some of the eminent naval characters alluded to, may be regarded as an excusable professional vanity, but it cannot be expected, that they will be admitted by those who have opposing rights, until they are shewn to be founded on a more solid and rational ground,—and confirmed by that test, to which they themselves have referred;—the statute for the government of the navy.

A case is mentioned by *Mc Arthur*, but which has no tendency to support the general superiority asserted, in which a naval court martial is reported to have held cognizance of a charge preferred against an officer of the 11th regiment of foot *(Lieutenant Fitzgerald)*, for contempt

shewn towards *Captain Tyler*, the commander of the vessel on which he was embarked, in the execution of his *Captain Tyler's* duty; and the court, notwithstanding the protest of *Lieutenant Fitzgerald* against the competency of the proceeding entertained jurisdiction over the charge, and after an investigation *ex parte* (for *Lieutenant Fitzgerald* would not submit to take any part in the inquiry) of the subject matter of charge, adjudged him to be dismissed from his Majesty's service, and to be incapable of serving thereafter in any military capacity.

It is not said, whether *Lieutenant Fitzgerald* was afterwards restored, nor is it material to the view which has been taken of the intent of the naval statutes and articles; since the regiment, to which *Lieutenant Fitzgerald* belonged, was at the time, when the offence was committed, embarked on *marine duty*, which brings his case within the meaning and spirit of the 4th section of the 19th of the King; and will serve to confirm, rather than to weaken, what has been previously urged on that point.

In the year 1804, certain officers and men of the royal artillery were ordered to do duty, *pro tempore*, on board his Majesty's bomb-vessels on various stations; and the commanding officers of such vessels assumed to exercise so full and complete a command over the artillery-men, as in some instances to punish them, for slight offences, without the form of trial, on which a variety of complaints were forwarded by the officers of such men to the *Master General of the Ordnance*, who represented the matters stated to him to the *Admiralty*, and required that a repetition of such cases, extremely embarrassing to his Majesty's service, might be prevented. This representation produced a circular communication from the *Lords* of the *Admiralty* of the following tenor,—

"Whereas we think fit, in order that a regard may be

"paid to the discipline of the bomb-vessel you command, "by the men belonging to the *Royal Artillery*, who may be "embarked on board her, that in the event of any such men "behaving themselves improperly, they should be confined "in such manner as is usual on board his Majesty's ships; "you are, in case any of the said men should so behave "themselves as to render that measure necessary, hereby "required and directed to confine them accordingly; taking "care, if the offence should be committed during the time "the said bomb-vessel should be employed on home ser-"vice, to transmit to our secretary the particular circum-"stances of such offence, in order that a proper representa-"tion thereof may be made to the Board of Ordnance. But "if the offence should be committed during the time the "bomb-vessel under your command shall be employed "abroad, you are in that case to transmit an account thereof "to the commander in chief, or senior officer of his Ma-"jesty's ships employed on the station where you may be "employed, who will communicate the same to the *general* "*officer* commanding *his Majesty's troops there*, in order "that the person or persons so offending may be tried for "their conduct by a court martial."

The above communication of the Admiralty unequivocally declares their impression of the illiability of artillerymen, while on board his Majesty's vessels, to the Naval Articles, and in a case too, when they were in actual and especial service on board such vessels.

Artillerymen are to all intents and purposes soldiers, and are, like them, subject to the common provisions of the Mutiny Act and Articles of War; and it would require much ingenuity to shew any striking difference in the condition of these two descriptions of soldiers, to render the one more than the other objects of the naval statutes. If there be any distinction, so as to save one of these classes

from the operation of the statute, it is certainly in favour of the ordinary soldier; who is not sent on board for the purpose of carrying on, or speeding the business of the navy.

But if the collective and deliberate opinion of the admiralty had not been so decidedly expressed, in the foregoing document, and a solemn proceeding founded thereupon, the manifold inconveniences that might result from a contrary construction, would be sufficient of themselves to shew that it could not have been legislatively intended. For if the Naval Articles could be understood to apply to soldiers on board his Majesty's ships, they must extend also to officers, be their rank or degree what it may. So that by the operation of such Articles, the General, and the principal officers sent on a distant expedition, might possibly be removed from their command in the course of the voyage, by the sentence of a naval court martial; and the objects of the public service, so far as depended on the particular skill of such selected officers, be utterly defeated. The ranks, as well as the superior officers, also, might be diminished, to any conceivable degree, by the same means; without any direct communication with the King or the commander in chief, and *that* by the sentence of possibly five captains, of a few months standing in the navy, and hastily cast together in the course of the service, or even by accident.

In this way the economy of a great military operation might be altogether deranged, and the system of military law wholly overturned. It is only necessary to advert to these possible cases, to shew, that the legislature could never have designed, that they should by any possibility happen.

But though officers and soldiers of the land service are not, as I have endeavoured to demonstrate, liable to the provisions of the naval statutes, whilst embarked for transport on board his Majesty's ship, they are still for some purposes, as described in this Article, subject to the com-

mand of the captain of the King's ship, and of the Admiral of the fleet, if any such be present. In this respect, they are placed in the same situation as if they were, for the time, in a garrison, subject to the command of a governor, or military commandant, under an especial commission, possibly of inferior rank to the officer commanding the troops temporarily placed in, or passing through the garrison. The last-mentioned officer would not be competent to hold or execute the sentences of courts martial, within the local limits of such especial command, without the permission of the governor.

But whether the cases supposed be exactly similar or not, it has been directed, that courts martial may not be holden, by the commandant of the King's troops on board ships of war, as matter of right. This was determined in the instance of *Colonel Talbot*, who assembled a court martial, on board the Niger, *Captain Larmour*, in the year 1800, for the trial of a serjeant, who was reduced to the ranks. The proceedings, however, were not approved by his Royal Highness the Commander in Chief. But offenders against the Mutiny Act and Articles of War may be imprisoned and tried for the offences committed at sea, at the places where they may be disembarked, or elsewhere, according to the convenience of the service.

The latter arrangement must prevail until some more eligible system shall be happily formed, which may reconcile the differences and prejudices, attended often with embarrassments, in the several branches of the King's service.

SECTION THE TWENTY-FOURTH.

Relating to the foregoing Articles.

THE Articles, that remain to be considered, are in general explanatory of the regulations contained in the preceding Sections, and, in some respects, expletory of what had been conceived to be deficient therein.

ARTICLE 1st.—This ordains that no officer, non-commissioned officer, or soldier, shall be adjudged to suffer any punishment, extending to life or limb, by virtue of the Articles of War, within the united kingdom of *Great Britain and Ireland*, *Jersey*, *Guernsey*, *Alderney*, *Sark*, and *Man*, and the islands thereunto belonging, except for such crimes as are in the said Articles expressly declared to be so punishable within the same; thereby limiting the jurisdiction of courts martial over the higher orders of military crimes, affecting the life or limb of the military subject, to such offences only as are declared and described by the Rules and Articles of War; which in their turn are controlled and limited, as it has been heretofore shewn, both in respect to the crimes, which they declare, and the punishment awardable to such crimes, by the letter of the Mutiny Act. This Article in effect says, that the principal or capital crimes shall not be increased beyond the number enumerated in the Rules and Articles of War.

ARTICLE 2d.—The former Article, as it has been explained, relates to *defined* and *declared* crimes, of the highest quality; with the specific and assigned punishments applicable thereto; restraining courts martial from the cognizance of the higher order of military offences, except in as much as they are expressly submitted to their jurisdiction

by the Articles of War. Now this Article respects only offences of a *secondary* character; that, in contradistinction to the former, have *not* been defined or declared by the Rules or Articles of War.

The object of the Article is to give as complete a jurisdiction to the martial court, over such last-mentioned offences, in as far as is provided by the Article, as if they had been the subjects of direct or express provision,—declaring— "but all crimes not capital, and all disorders and neglects "which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not specified in the said rules and articles, are to be taken cognizance of by a general or regimental court martial, and "to be punished at their discretion."

This Article would appear, on an immediate view, to grant to courts martial, almost an unbounded jurisdiction not only over the body of the offences, but the persons of the offenders, within the scope of the authority communicated—to declare what shall amount to the crimes in contemplation, and what the quantum of punishment assignable to them; governed not in any thing but by its own discretion. The power confided to the military court is certainly very large, and is in some sort repugnant to the general strain of our general or national code, which recognises not any crime, for the purpose of legal investigation and punishment, that is not defined and plainly indicated by the law. But there are offences, of an inferior quality, acknowledged even of the common law, as slightly or imperfectly described, in the books of authority on the subject, as the offences specified in the Article under consideration; though it must be confessed, that in most, the kind, if not the degree of punishment, adjudicable to such offences, is described with certainty; a circumstance wanting here.

If it had been possible, it might perhaps have been of

more inconvenience in military life, than of practical utility, to have set forth with minuteness the long list of minor offences, of which officers or soldiers may be guilty, so as to amplify into a volume the few sheets which contain the body of the military law, and to render the frequent publication of the law, as now beneficially practised, thereby impracticable. Under an impression of this sort, the legislature may not have exhibited the usual care which it is wont to use whenever it is intent on legislating in criminal matters, in circumstantially describing the offences which it designs to subject to the reprehension and correction of the laws.

In the 24th Section of the Mutiny Act, which relates to the like offences, in as far as they may affect soldiers, included under the present Article, the same are no otherwise noted, than under the description of "immoralities, misbe-"haviour, or neglect of duty;" a definition equally general with that employed in the Article before us.

Though the Mutiny Act has not given any specific description of the offences here alluded to, it has clearly and strictly defined the nature of the penalties, as they refer to soldiers, awardable to them; namely, imprisonment, or corporal punishment, not extending to life or limb.

This Article, on the contrary, which is apparently founded on the 24th clause of the Mutiny Act, is more specific and definite, in respect to the offences within its aspect; than in respect of the punishment which they involve.

The crimes, disorders, and neglects, which by this Article are subjected to the cognizance of courts martial, must be, as the Article expressly describes, "to the prejudice of *good* "*order* and *military discipline*;" that is, they must be offences of a military character, contradistinguished from crimes of a civil complexion. The latter, except in a special and extraordinary case, particularized in a subsequent clause in

the present Section, are cognizable by a distinct forum, separate from the military tribunal; to which, and for many satisfactory reasons, they ought at all times to be submitted; unless the court martial has a clear, undoubted, and express concurrent jurisdiction, which it has in some cases with the common law courts.

The offences, within the meaning of this Article, must not only be of the quality described, "to the prejudice of "good order and military discipline;" but must have been wholly unspecified, in any of the preceding Sections of the Articles of War. For when an offence is of that specific quality, as to be reducible to a particular Article of War, to which a known and distinct penalty is attached, it must be prosecuted under such Article, that the plain intent of the law and the purposes of justice may be fully answered. This is as much to be demanded for the safety of the individual, as for the benefit of the public; lest in the *one* instance the presumed offender may be deprived of the advantages of having the body of his supposed fault alleged with certainty, for the purpose of his more complete defence, and for possible ulterior consequences; or may not have a knowledge of the punishment to which he may be liable, and so rendered amenable to penalties of an arbitary character, where the legislature or the Crown had determined the kind and degree of punishment. And, in the *second*, lest the general Article might be resorted to, in a partiality to individuals, when the known penalty declared by a particular Article might be considered more severe than the discretionary punishment which a court martial might be ordinarily disposed to award. In either of which cases, the policy of the existing Article might be defeated, which is to provide a general remedy for a wrong which had not elsewhere been provided for; and not to screen a particular and well-known crime by confounding it, in description, with

a general, uncertain, and unspecified offence. The Article holds not out a substitute, but a substantive course of prosecution for offences not otherwise declared than through its own medium.

The court martial, on the conviction of an offender, of any of the offences embraced by the Article, is left to award such punishment as in its discretion may seem meet, according to the nature and degree of the offence. But such discretion must be a reasonable discretion, consistent with usage and custom, and conformable, where there is any direct legislative regulation, to the tenor of the law.

The discretion to be exercised by courts martial, generally, in respect to private soldiers, is referable more to the degree, than the kind of the punishment to be adjudged. Owing to the circumstances or condition of the soldier, they have barely an alternative between corporal punishment and imprisonment; and the latter, as a means of punishment, has only been recently allowed to them to award. The Mutiny Act of 1811 authorizes the imprisonment of soldiers for the first time, and affords facilities for carrying such punishment into effect—regarding it as a convenient and eligible substitute, in certain offences, or the peculiar situation of the offender, for corporal chastisement. So that when it is used, aud more especially in the cases comprehended by the present Article*, it must be in the place of, and not in addition to corporal punishment.

Officers, as well as privates, are liable to charges founded on this Article: and in those cases, courts martial have a greater latitude in their discretion; but they are bound to exercise it, as in the former instance, by the usage and custom of the service, or the prescriptive letter of the law, and are not at liberty to indulge in the adjudication of arbitrary or unheard-of penalties.

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* See the 24th clause of the Mutiny Act.

ARTICLE 3d.—The liability of persons, employed in the recruiting service of the army at home, and in occupations connected with the camp abroad, to the orders and commands of the military superior, though not directly vested with a military character, is asserted and declared by this Article.

The first persons described in the Article, namely, "serjeants, non-commissioned officers, and persons employed on the recruiting service, receiving regular pay in "respect of such service," are rendered expressly subject, by the first clause in the Mutiny Act, to all the penalties, annexed to the higher species of military offences, under the description of persons, being "in pay, as non-commissioned officers or soldiers," and that they are, in the same relation, liable to the penalties, declared by the Rules and Articles of War, as awardable against the respective offences set forth in the same, has been solemnly recognised in the case of *Serjeant Grant**, which was argued before *Lord Loughborough*, in the court of Common Pleas, on a motion for a prohibition to restrain those, charged with the execution of the sentence of the court martial, from proceeding to execute the same; on the ground, principally, though there were other causes assigned, that the party convicted was not subject to the law martial, from the circumstance of his not being in *fact* a soldier, *i. e.* enlisted, or enrolled as such. But it was held by the *Lord-Chief-Justice*, that it was enough to fix him, under the terms of the Mutiny Act, with all the responsibility of a soldier, under the statute and the Articles of War, that he had received pay *as* a soldier, though he might not have all the other characteristics of the military condition about him. The decision pronounced in this case has never been questioned—nor,

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* Vide *H. Blackstone's* Report.

from the plain reason, on which the judgment hinged, is it likely to become hereafter a subject of doubt.

The second description of persons, to which the Article refers, namely, "*sutlers*, and *retainers* to the *camp*, and persons serving with the *King's* armies in the field," though they should not be enlisted soldiers, are subject to military orders, not by the letter of the Mutiny Act, but by the usage and customs of war.

Armies, serving in the field, are at all seasons accompanied by a long train of followers, administering to the support, comfort, and convenience of the troops—some of them public functionaries, such as commissaries, contractors, and their subordinates; and others, of a private condition, as victuallers, shopkeepers, and private dealers, with servants or attendants, attached to the service of the camp, or of individuals retained in it; the number of these different classes of persons bearing a great proportion often to the numbers of those contained in the ranks of armies. These various descriptions of persons live within the boundaries of the camp, have their appointed stations in it, and their persons and their property guarded alike with the soldiery: they are stationary as it is stationary, and move whenever it moves; all their dealings and transactions are with the military state: and their peace and quiet is so intimately connected with that of the military body, that the one cannot be disturbed without the other. Being so blended together in their local situation,, in their concerns, and their interests with the soldiery; it would seem almost impracticable to govern them by any other than a law common to them both: and the ordinary law, being wholly incompetent in its provisions and means to the military state and its affairs; which is admitted, in the formation by the legislature of separate and especial regulations for its government; and there being neither civil courts, nor instruments in the camp for the administration of the ordinary

laws; and in foreign countries, the common field of operation to our armies, the laws themselves being wanting, the temporary sojourners, and voluntary members of the camp, are thrown, from absolute need, under the influence of the prevailing law (for it can hardly be insisted that they could he safely left to themselves); whence alone results an uniform and consistent rule, and reciprocal protection.

If agents, so opposite to one another, as military and civil subjects, were allowed to act under different responsibilities, it would give rise to continual embarrassments and confusion: and it would be as impossible that the quiet and safety of the camp could be ensured in such a dispensation, as that the operations of the army should proceed with unity, consistency, and effect. Besides, the supply of the camp, with the necessary attendance connected with it, is part of the economy of all armies, and is a subject of arrangement, as much as any other disposition, more purely military; or otherwise the enemy might avail himself, in many cases, of the succours intended to have been employed against him. Hence the followers of the camp, touching all their relations with the army, and their demeanour within it, respecting the order and discipline to be observed therein, have, from the necessity of the thing, been subjected at all times to military orders, and as a consequence, to the jurisdiction of the military courts, not less for their own protection, than the quiet and security of the military state.

So early as in the war statutes of *Henry* the *Fifth*, it was generally ordained, "that all persons, remaining with the "army, of what state, dignity, nation, *order*, or *condition* "soever, shall in all things lawful and honest, *obey* the con-"stable and mareschall," then the principal officers of the royal armies. There is a subsequent clause in the same statutes, not only enjoining, "that merchants, either *tra-*"*velling* with the army, or *buying* or *selling* in the markets,

"shall obey the constable and mareschall, and even the "clerk of the market, as the king himself; but that all con-"tracts, crimes, and suits, shall be heard and finally deter-"mined by the court of the constable and marshall", (correspondent with the courts martial of the present day) "when one or both of the contractors, delinquents, and "suitors, are belonging to the army, whether soldiers or "merchants, or handicrafts, &c."

In several of the ancient ordinances, anterior in date to those last mentioned, and in others of a later period, there are a variety of regulations laid down for the observance of victuallers, as well as in respect to the articles of food and provisions furnished by them, as also in reference to the grooms, pages, boys, and private servants, of the camp, who appear at all times to have been reckoned as constituent parts of the armies.

The branch of the Article, now under consideration, turns on the like principle with the preceding ordinances, specifying the different descriptions of persons included in it; these are, 1st. *Sutlers*, 2d. *Retainers* to the *camp*, and 3d. All persons *serving* with the *King's armies*, in the *field*, though *not enlisted soldiers.*

To see who are intended by these descriptions, it will be requisite to consider them, each in their order.

1. Who are designated under the description of *sutlers.*— Under this term, familiar to the army, are comprehended those who supply the camp with food and liquors, and articles for general use or consumption. Any dealer or chapman would seem to fall within this comprehensive denomination. It might not be easy, perhaps, to find a very exact and accurate definition of the term; but in the Rules and Articles of *James* the *Second*, it appears to carry with it a synonimous meaning with "seller of ale, beer, wine, or "any sort of drinks, bread, victuals, or other commodities,

" or merchandise, whatsoever," wide and broad enough to embrace (and such a sense and signification has been usually given to it in modern times by the military courts) every trader within the boundaries and environs of the camp.

2. *Retainers.* By which term are inferred such persons as are attached to the camp, by fee, stipend, or pay, either temporary or permanent, as commissaries, with their long list of clerks and attendants, drivers, guides, and others, too numerous to be particularized; maintained at the public expense, and employed on the public service.

3d. Persons *serving* with the armies—a description not only including all those comprehended under the latter term, but far exceeding it in generality. It attaches as well to those, who receive private wages for their services from individuals enrolled in the army, as to others, who serve by public engagement and for public reward or pay.

Every one of the persons specified are subject, by the second branch of this Article, to military command, and as a necessary resulting consequence to military law; so that the proof of their submission to the one, would seem decisive of their subjection to the other. But *sutlers* and mere *camp-followers,* though they be liable to receive the orders of the military superior, and are obliged to act in conformity thereto, it is more in a civil than a military capacity, that they are so bounden. They are not compellable, by such orders, to perform the proper or peculiar duties of soldiers, having nothing to do with that relation; yet there belong to them duties, which, in common with the soldiers, they are obliged to attend to, and to act in all things as they may be commanded by the military chief, *i. e.* for the maintenance of the peace, and order of the camp—the observance of public and individual rights, and in abstaining from wrongs and injuries, and in so conducting themselves and their merchandise, and goods, their carriages and horses, according to the orders they

may receive, to secure their safety, or to prevent their falling into the possession of hostile hands. In all of these, and other like duties, they are as much liable to military command, and legal punishment, consequent on a disobedience thereto, as the merest soldier of the camp, although not obliged to do the actual duties of a combatant. To this end, they will be expected to inform themselves of the general rules and regulations applicable to their temporary condition, as well as of the special directions that may be from time to time issued for the government of their conduct; for ignorance of such regulations, as of any other law having local effect, cannot be admitted as a plea for any imputed breach; for in entering into any new society, having peculiar laws of its own, every one in order to conform himself to the legislative will, *ought* to acquaint *himself* of their provisions; and is therefore presumed to have informed himself of that which it is his duty to know. Hence ignorance in such a case is never admissible as an excuse.

The following precedents of a very late date, may shew the extent of the provision in this the latter branch of the third Article.

At a court martial holden at *Mello*, 14th August, 1810, *J. Smyth*, a *private servant* to *Assistant Commissary Sawyer*, and a *follower of the army*, was arraigned for robbing his master of the sum of one hundred and six pounds sterling, or thereabouts, at or near *Formosa de Salvador*, on or about the 19th June, 1810: and on consideration of the circumstances of the case, and of the evidence adduced thereon, the court was of opinion, that the prisoner was guilty of the charge exhibited against him, being in breach of the Articles of War, and sentenced him the prisoner *J. Smyth*, a follower of the army, to be hung by the neck till dead—which sentence was confirmed and ordered to be executed on the Monday following.

The party here was the *private* servant of a person only, temporarily attached to the army—and the crime was committed in a friendly country, of which the supreme authority of the state would have had the cognizance, had it been perpetrated under ordinary circumstances.

The next case, to which I would advert, is, that of *Bridget Dougan*, who was tried at *Coimbra*, in the month of March, 1813, being charged with privates *Flannaghan*, *Fay*, and *Slack*, of the 87th regiment, "with having been concerned in firing into and breaking open the house of a "Portuguese at *Asceciara*, about the 22d or 23d January, "whilst on the march up from *Lisbon*, and taking a quantity "of wine there, without paying for it, and for stealing and "being accessary and concerned in stealing from the above "house a pair of ear-rings, a dollar and a half in cash, and "a quantity of linen, wearing apparel, and other articles, "the property of *Jooquin Madura*, &c."—She was described in the charge as a follower of the regiment.

The court entertained the charge, as against the said *Bridget Dougan*, but acquitted her of the facts alleged against her.

It is to be remarked, that she was a follower only of the regiment, and so charged—and was implicated in the alleged crime, in the way to join the army, and probably going thither with a party of the corps.

The liability is carried further, in the instance about to be specified, than in the others immediately noticed; and perhaps as far as the principle can possibly be extended.

At a general court martial, held at *St. Jean de Luz*, in the month of December, 1813, *Jose Antenôsa*, and *Jose Bernados*, followers of the army, were arraigned on charges to the following effect:—

"For being concerned in robbing or forcibly stealing, "from *Stephen Pellot*, an inhabitant of *Andaye*, entitled to

"protection, about nine doubloons, and one dollar, from his "mother, and some articles specified, of woollen and linen "manufacture; and for drinking or destroying a quantity of "wine, described, and on a day mentioned, and for firing "at the said *S. Pellot*, with intent to kill and murder "him, &c."

The court found both the prisoners guilty of the first charge, and of being concerned in firing at the said *S. Pellot*, and with the intent alleged, forming the subject of the second charge—and sentenced the prisoner *Jose Bernados* to be hanged, and the prisoner *Jose Antenôsa* to receive one thousand lashes. The sentence was confirmed by his Excellency the Commander in Chief.

This Article, so far as it respects sutlers and retainers, and persons serving the armies in actual service and in the field, does not attach to the same persons, in cantonments, or in barracks at home, or in similar establishments, which are of a permanent and domestic nature abroad, where the ordinary laws have their force, and are administered through the medium of the civil courts.

ARTICLE 4th.—This Article originates in the exercise of the King's prerogative, as chief civil magistrate, as well as the supreme of the military state, in an especial case, which otherwise would have been attended by a failure of justice. It gives authority to the general, governor, or other officer commanding in chief in the garrison of *Gibraltar*, the island of *Malta*, or in any place beyond the seas, where his Majesty's forces are or may chance to be employed, and where there is no form of civil judicature in force, to appoint general courts martial, for the trial of any person under his command, accused of wilful murder, theft, robbery, rape, coining or clipping the coin of *Great Britain* or *Ireland*, or any foreign coin current in the garrison or place under his command, or of having used violence, or committed any

offence against the persons or property of any of the King's subjects, or of any others entitled to the King's protection: and the persons so accused, if found guilty by such courts martial, shall suffer death, or such other punishment as by the sentence of such general court martial shall be awarded, —and this, notwithstanding the provisions contained in the eleventh Section * of the Rules and Articles of War, and, it might have been also added, of the 17th Section of the Mutiny Act, requiring that such persons should be delivered up to the civil magistrates for the purposes of trial and punishment.

This Article, so far from superseding the royal and legislative provision, as at first sight it would seem, gives effect to its intention, which from the absence of a civil court to enforce it, would otherwise have failed.

This is effected by the simple process of the substitution of a martial, for a civil court, where the latter could not be resorted to. In every other respect, except in the court itself, and the mode of proceeding therein, the body of crimes specified, and those committing them, are left as they previously were, under the known laws of the land.

The very essence of the jurisdiction of courts martial, over the crimes described in this Article, is, that they are not cognizable, from the absence of an appropriate forum, by a local civil court. Where the latter exists, either in the place where the crime may be committed, or in the province or country of which such place is a constituent but subordinate part, the court martial cannot, by this Article, entertain jurisdiction of the described offences.

As the operation of the Article is merely to substitute one court for another, and not to interfere with the law, either as descriptive or definitive of the crimes themselves, or of the punishments awardable by the statute or common law

* Article 1st.

against those who may be guilty of them; the court martial, to which this especial jurisdiction is transferred, will be bound to consider the particular crimes that may be brought before it, by virtue of this Article, according to the definition and construction of the known law of the land, and conduct its proceedings, in the investigation thereof, as much as it may be practicable, after the manner of the proceedings obtaining in the civil courts; and to pass such sentence or sentences as may be conformable to the law.

I am induced to offer the latter observation, from a knowledge that courts martial have sometimes conceived, from the very general and perhaps confused manner in which the authority is given to such courts to award punishment against the crimes particularized in the Article, that they are at liberty to use a much larger *discretion*, than the Article intended they should exercise. It has been considered, in all or any of the cases, when satisfactorily made out by evidence, that death or a discretional punishment may be indiscriminately adjudged to the offenders, at the pleasure of the court; without regard to the particular judgment prescribed, in the respective cases, by the known law of the land.

Under an impression of this sort, a general court martial held at *Gibraltar*, sentenced a private of the name of *Bianchi*, belonging to the foreign depôt at that garrison and who had been convicted on a charge of murder, to receive a heavy corporal punishment, from the sole circum stance, that the required proportion of the members of the court, *i. e.* nine out of thirteen members, could not be brought to agree in awarding a capital punishment.

But, having found the facts charged, the court, it is presumed, had no discretion as to the punishment to be adjudged,—the law having clearly designated what it should be, and which the court was bound to pronounce. The sentence passed by the court, in a contingency of some diffi-

culty, and under a desire that the crime proved should not go altogether without punishment, was tantamount to an acquittal, being such sentence as could not be lawfully executed.

In other cases, of burglary, highway robbery, or the like, courts martial have sentenced the persons convicted thereof to the militarychastisemet of corporal punishment, instead of the punishment of death, or transportation, or any other mode of civil sanction conformable to the common law, as suitable in the opinions of the court to the circumstances of the respective cases. And in some instances of joint crime, where two persons have been arraigned under "one as "the same charge," have ordered one of the parties convicted to be hanged, and the other to receive, after the military mode, a given number of lashes; losing sight, as it should seem, of the special jurisdiction they were at the time exercising, or entertaining not any clear or precise notion of it. This is exemplified in the sentence passed by a court martial held at *St. Jean de Luz*, in December, 1813, on *Jose Bernados* and *Jose Antenôsa*, for robbery, or forcibly stealing, &c. &c., wherein the first was condemned to be hanged, and the other to receive one thousand lashes *.

It hardly need be stated, that the sentence here passed, in as much as refers to the case of *Jose Antenôsa*, is not reconcilable to the Article under consideration.

The errors above noticed, originated, no doubt, in the idea, that courts martial, from the general wording of the latter clause of the Article, may award to those, guilty of all or any of the crimes particularized therein, death or such other discretional punishment, as to them may seem meet, without reference to what the common or statute law has provided in the several cases. But to support such a supposition, it must be conceived that the King of himself has

* Case referred to in the preceding Article.

authority to supersede the well-considered, and graduated punishments that the known laws of the land have thought fit to ordain; and what is still more repugnant to the kingly prerogative, intrusted to the Crown for the good of the subject, that he can, at his pleasure, subject a secondary or petty offence to the same severe judgment, with the most flagrant and heinous crime. For if courts martial might at their pleasure, under the supposed operation of this Article, award death or any other punishment against the offences mentioned therein, they might assign the *ultimum supplicium* to the slightest personal assault; or the most trifling species of imprisonment, to rape, or murder: which could scarcely enter into the imagination of any man on the least serious reflection.

The intention of the Article in question, although it is somewhat imperfectly developed in the language in which it is couched, is to give to the courts martial a jurisdiction over certain offences, cognizable by the statute or common law of the land, and of course subject in every thing that is material to the provisions of such law. The offences and offenders rendered liable by this Article to the new jurisdiction, are of two descriptions; the one *capital*, the other *secondary*.—And two distinct punishments, the one *fixed* and the other *discretional*, are awarded to these offences or offenders. There can be no doubt, that the fixed punishment of death was intended to be adjudged by the Article to the principal class of offences and offenders within its view, and the uncertain or discretional punishment to the minor offences; but the offences, offenders, and punishments, are so blended and mixed together in the Article as to render the construction of it at least doubtful, whether it prescribes the distinctive and distributive application of the different species of punishments of the different classes or degrees of the offenders and offences, or whether it authorizes the application

of either description of punishment to all or any of the offences, indiscriminately, according to the discretion of the courts martial. This leaves the courts acting under such Article in great uncertainty, if not in some degree of hazard.

An amendment of this important Article has been humbly recommended in preceding pages *, and the necessity of such amendment would seem admitted by the authority, whence the Article proceeds. After this acknowledgment, it may be expected, that the required alteration in the letter of the Article will follow as of course.

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* Pages 181, 182.

Since the first sheets of this volume have been in the press, I have been favoured with the copy of the following circular letter, addressed from the Horse-Guards to the general officers commanding foreign stations. It has so peculiar a bearing on the present Article, that no excuse will be required for the insertion of it at length.

Horse-Guards, 12*th Dec.* 1807.

CIRCULAR.

To General Officers commanding Foreign Stations.

SIR,

I have his Majesty's commands to inform you, that doubts having arisen as to the true construction of that part of the 4th Article of the 24th section of the Articles of War, whereby it is enacted, " that persons found guilty " of the offences therein described shall suffer death, or such other punish- " ment, *according to the nature and degree of their respective offences*, as by " the sentences of a general court martial shall be awarded ;" his Majesty has been pleased to declare that the true intent and meaning of the above recited part of the said Article, is, that courts martial exercising jurisdiction under the 4th Article, are bound to award such punishments only as are known to the laws of *England*, and that they are bound also to apply to each particular offence the same punishment, both in kind and degree, that is applied by the common or statute law of *England*, and his Majesty has been further pleased to declare, that courts martial, though assembled on foreign stations, where there is no form of our civil judicature in force, have no power under the authority vested in them by the said Article to award any punishment for offences under the Mutiny Act, other than such punishments as are directed by the Mutiny Act ; and I have therefore,

ARTICLE 5th contains a mere regulation, that the Rules and Articles of War shall be read, and published once in every two months at the head of every troop or company, mustered or to be mustered in his Majesty's service; and an injunction that they shall be duly and exactly obeyed by all officers and soldiers, with an exception of what relates to the payment of soldiers' quarters and to carriages, which are to be governed, as the Article finally explains, by peculiar *local circumstances.*

CONCLUSION.

It has been the object of the preceding chapters to give a summary historical account of the law, applicable to the government of the British armies, from the earliest periods of which there are any records, to the present hour—to shew the sources whence it originated, the means through which it has been administered, and more particularly to describe, intermediately recounting the various changes to which the body of the law has been subjected, what it now is, in its more perfect form and structure; vindicating its character from ancient prejudices, and obviating the reproaches cast

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to desire that you will give the whole of this matter due consideration, and govern yourself therein accordingly.

I am, &c.

FREDERICK,
Commander-in-Chief.

Though the declaration, contained in the preceding letter, is entitled to, and must have great weight with those to whom it is addressed, it may not, it is apprehended, have all the force or authority, and certainly not the general authority, that an express Article would have on the same subject, whether in an original or amended form. Besides, the law should be clear enough in itself, to obviate the necessity of applying to other documents for the interpretation of it.

on it, without a due consideration of the advantageous alterations it had experienced in modern days.

It has been no inconsiderable part of the design, however it may have failed in the manner of its execution, to explain with the letter of the existing law, the reason on which it is founded; to which end, a variety of ancient regulations have been referred to, in illustration of the apparent spirit transfused from them into later military ordinances, and in elucidation of the gradual and systematic course of amelioration, which the law martial, like all other legal institutions in their natural progress, has been permitted to participate.

The law, in its prevailing letter, with all its peculiarities, has been examined as a whole, as well as in its parts; both as it is presented in the annual Mutiny Act, and in the various Sections of the Rules and Articles of War, engrafted, in a less fugitive form, on its basis. These also have been illustrated, so often as they have been available, by the remarks of professional or military writers, and by modern decisions and practice; rendering principle and practice, so far as they are convertible to one another's aid, serviceable to the mutual elucidation of each other, and to these I have ventured to add some commentaries, not of the same authority, for which a more comprehensive apology is due. The latter, it is felt, will be of little importance, when they appear not to be sustained by admitted principle, general reasoning, or particular precedent, which in the course of an extensive personal exercise in courts martial, I have been able to collect, and I trust, faithfully to apply.

If I have not succeeded in shewing that the law military, as now obtaining in *Great Britain*, is as perfect in all its provisions as the civil code, I have at least shewn, that it has received, since the era of the revolution, and more especially during the reign of his present Majesty, numerous

amendments and improvements, in intimate approximation to the perfection of its rival code, to which alone, even in its present shape, it may be admitted inferior; whilst it holds over the military institutions of all surrounding nations a proud and commanding superiority; eminent as those great and inseparable results from the law (admitted and admired in foreign lands), the *discipline* of our *armies*, and the *steady* and *reasoned valour*, arising out of the sense of its protection, of every soldier composing them.

It had been originally intended, that the work should unite, with the description and definition of the law military, some account or history of courts martial, through which it is administered, and of the order of proceedings obtaining therein, for which copious materials had been provided and prepared; but the work, as it now appears, had grown, in treatment, to a great bulk, threatening to swell into a yet larger compass, and requiring, in prudence, to be reduced, ere it reached an unwieldy size, to some definite form and shape; so that the original intent has been postponed, if not foregone; leaving it to the opinion which may be expressed of the present volume, or the encouragement it may receive of those to whom it is professedly addressed, to decide, whether enough has not been executed already, or whether the ulterior purpose shall be hereafter pursued or abandoned.

THE END.

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